Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

75-30

LUCILE MONK, ET AL., *Petitioners*

v.

CHAMBERS & KENNEDY, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES CONSTITUTION

Article 3, Section 2, Clause 1 2

IN THE

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OCTOBER TERM 1975

LUCILE MONK, ET AL., *Petitioners*

v.

CHAMBERS & KENNEDY, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I. Decisions Below

The decision of the Court of Appeals is reported as Dearborn Marine Service, Inc. v. Chambers & Kennedy, 499 F.2d 263 (5th Cir. 1974). The decision of the District Court is reported as Armstrong v. Chambers & Kennedy, 340 F.Supp. 1220 (S.D. Texas 1972). (See Appendix)

II. Grounds of Jurisdiction

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed

was dated and entered on August 22, 1974. A petition for rehearing en banc was denied by order dated and entered on April 7, 1975. The Honorable John Brown, Chief Judge of the Court of Appeals, filed a dissent to the denial of the petition for rehearing on April 23, 1975. (See Appendix) No extension of time for filing of this petition has been sought. Jurisdiction is conferred upon this court by 28 U.S.C.A. §1254(1).

III. Questions Presented for Review

A. Whether the Outer Continental Shelf Lands Act ousts the maritime laws application to the death of an offshore worker aboard a vessel 12 miles from shore because the agent causing the wrong is initially emitted from an artificial island.

B. Whether the Outer Continental Shelf Lands Act ousts the Death on the High Seas Act's applicability to the death of an offshore worker on a vessel 12 miles from shore because the agent causing the wrong is initially emitted from an artificial island.

C. Whether there was evidence to support the trial court's finding that William Monk was within the vessel when the flaming ball of fire fell on it and was not killed immediately but sought to find some way to escape, and for a period of several minutes until death overtook him at the forepeak suffered excruciatingly.

IV. Constitutional Provisions and Statutes Involved

Article 3, Section 2, Clause 1, United States Consititution: "The judicial power shall extend to all cases * * * of admiralty and maritime jurisdiction * * *."

Death on the High Seas Act, 46 U.S.C. §761:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation, which would have been liable if death had not ensued. Mar. 30, 1920, c. 111, §1, 41 Stat. 537."

Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1333 (a)(1) and (a)(2):

> "(a)(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.
>
> (2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for

that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf."

V. Statement of the Case

William C. Monk met his death while performing his duties aboard the M/V CARRYBACK, an 85-foot vessel of 136 gross tons. At the time of the death, the vessel was in service approximately 12 miles from the Texas shore. The death was caused when a fireball emitted from a fixed storage platform involved in production of oil from the Outer Continental Shelf descended on the vessel.

Three other men met their death aboard the vessel, and the vessel itself was gutted by fire. The decision of the Court of Appeals for the Fifth Circuit would apply general maritime law to the destruction of the vessel, would apply general maritime law and the Death on the High Seas Act to the three persons aboard the vessel other than Monk, and applies Texas law to Monk. Under Texas law at that time, contributory negligence was a complete bar to recovery, and Monk's widow and children were denied recovery against the defendant who owned and operated the "bomb" sitting out in the Gulf of Mexico and the defendant whose employees negligently

caused the bomb to explode, because the district court also found Monk at fault in failing to give more explicit instructions to an independent contractor.

VI. Jurisdiction of the Trial Court

Jurisdiction of the trial court was founded under the Death on the High Seas Act, 46 U.S.C. § 761; the general maritime law, 28 U.S.C.A. § 1333; and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2).

VII. Argument

The decision of the Court of Appeals for the Fifth Circuit is contrary to this Court's interpretation of the Outer Continental Shelf Lands Act in *Rodrique v. Aetna Casualty & Surety Co.*, 395 U.S. 352, (1969); is contrary to this Court's definition of admiralty jurisdiction in *Executive Jet Aviation v. Cleveland*, 409 U.S. 249 (1972); and is contrary to this Court's determination in *Hough v. Western Transportation Co.*, 3 Wall. 20 (1866) ("The Plymouth"), that consummation of a wrongful act upon navigable waters involving the operation of a vessel would make applicable admiralty jurisdiction and the maritime law, and in this regard, is contrary to the Fifth Circuit's own decisions in *In Re Motor Ship Pacific Carrier*, 489 F.2d 152, 156-157 (5th Cir. 1974) and *Kelly v. Smith*, 485 F.2d 520, 523-526 (5th Cir. 1973); and the decision of the Sixth Circuit in *Smith v. Lampe*, 64 F.2d 201, 202 (6th Cir. 1933)

Prior to *Executive Jet Aviation*, the locality test was generally recognized as the touchstone to admiralty jurisdiction and application of the general maritime law.

Under any prior standards, the accident in question, occurring aboard a vessel in navigable waters, would fall within the admiralty jurisdiction. The fact that the negligent act which caused the catastrophe initiated from land has always deemed non-erosive of admiralty jurisdiction so long as the act or wrong was consummated in injury on the navigable waters. *Hough v. Western Transportation Co.*, supra, 3 Wall. 20; *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205-206 (1971).

In *Executive Jet Aviation*, the locality test was rejected as the sole determinative factor, although it remains necessary that the wrong be consummated on navigable waters. The Court determined that it was also necessary to show in order for admiralty jurisdiction to attach that the wrong "bears a significant relationship to maritime activity." *Executive Jet Aviation v. Cleveland*, supra, 409 U.S. at 268. In the present case, we have a vessel in the Gulf of Mexico standing by to transport workmen to and from the shore and the artificial islands in the Gulf. We submit that nothing is more maritime than a vessel in such service at such location. We further submit that there is a significant relationship to maritime activity that the owner and operator of an artificial island located as it is, not only in proximity to but actually in the sea, might maintain his facility in such a way that it might explode and cause damage to vessels in close proximity, cause oil spills which pollute the waters, or otherwise interrupt shipping in the area.

Examples of such activity as being within the notion of traditional maritime activity are shown in *In Re Motorship Pacific Carrier*, supra, 489 F.2d 152; *Kelly v. Smith*, supra, 485 F.2d 520; *Southern Bell Telephone &*

Telegraph Co. v. Burke, 62 F.2d 1015 (5th Cir. 1933); *The American*, 34 F. Supp. 855 (E.D.N.Y. 1940); *Smith v. Lampe*, supra, 64 F.2d 201 (6th Cir. 1933). In the *Motorship Pacific Carrier's* case, smoke emitted from a paper mill interfered with the vision of a vessel in operation on the Savannah River Ship Channel, causing the vessel to collide with a bridge. In *Kelly v. Smith*, an individual fired a gunshot from the shore, injuring the pilot aboard a small river craft in the Mississippi River. In *Smith v. Lampe*, the sound from an automobile horn interfered with the navigation of two vessels, causing their collision. In *The American*, a shore based plant emitted fumes or gas over the adjacent waters to interfere with the navigation of a vessel.

We respectfully submit that the emission of a fireball from an artificial island causes greater interference with navigation of vessels in close proximity than did the emissions referred to in the above cited cases.

But even more clearly maritime law would be applicable to the incident in question because of the Death on the High Seas Act. In *Executive Jet Aviation*, the Court recognized:

> "Of course, under the Death on the High Seas Act, a wrongful-death action arising out of an airplane crash on the high seas beyond a marine league from the shore of a state may clearly be brought in a federal maritime court." *Executive Jet Aviation, Inc. v. Cleveland*, supra, 409 U.S. at 271, note 20.

Thus, it must be beyond argument that maritime law—whether under the traditional maritime activity standard

or by force of the Death on the High Seas Act—is clearly applicable.

The question remains whether Congress intended to oust admiralty jurisdiction by passage of the Outer Continental Shelf Lands Act. This Court's decision in *Rodrigue* demonstrates that Congress had no such intention. The Court perceived that Congress made state law applicable to artificial islands because maritime law was not applicable. The Court explained:

> "Careful scrutiny of the hearings which were the basis of eliminating from the lands act the treatment of artificial islands as vessels convinces us that the motivation for this change, together with the adoption of state law as surrogate, federal law was the view that maritime law was inapposite to these fixed structures. * * * The decision to do so * * * recognized that if [state law] were not adopted explicitly, maritime law simply would not apply to these stationary structures not erected as navigational aides." *Rodrique v. Aetna Casualty & Surety Co.*, supra, 395 U.S. at 363-364.

Thus the Court in *Rodrigue* did not undertake to interpret the Outer Continental Shelf Lands Act as ousting maritime law for state law but rather recognized that state law was applicable because maritime law was not.

Here the circumstances of the catastrophe aboard the vessel invoke admiralty jurisdiction and maritime law. Thus, under the Court's analysis the Outer Continental Shelf Lands Act would have no impact upon an incident to which maritime law would have traditionally applied.

This must be particularly true where the state law being utilized (contributory negligence bars recovery) is inconsistent with otherwise applicable maritime law (contributory negligence mitigates damages). See *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953).

Moreover, it must be kept in mind that the Fifth Circuit's attempt to justify the apparent disparaging treatment allocated Monk's widow and children and the three other men killed aboard the vessel, as well as the property damage to the vessel itself is based upon the fact that Monk was a "platform worker"[1] and also that he was found (rightly or wrongly) to have played a role in the holocaust. As to the first distinction, the Court has never limited maritime law to those who work as seamen aboard vessels. See *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963).

As to the second distinction, it must be kept in mind that the determination of relative or co-relative fault in connection with an incident such as this may not be made until a final trial on the merits. It would seem inappropriate at least to have admiralty jurisdiction hinge upon whether there is an allegation and subsequent finding of contributory negligence. It must also be kept in mind that the captain of the vessel Carryback was found at fault in connection with the incident. Would this

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1. This designation by the Court of Appeals does not imply that it was fortuitous that Monk was aboard the vessel. Indeed the Court recognizes that he was performing his routine duties aboard the vessel. 499 F.2d at 267. (R. 520-521).

mean that state law should be applicable in determining the damages to the vessel, and thus render inapplicable proceedings for Limitation of Liability and such underlying matters as general average.

We respectfully submit that the decision of the Fifth Circuit is calculated to cause significant confusion in the law regarding the respective rights of persons involved in offshore drilling activities and should be reversed.

With regard to the question of the sufficiency of the evidence to sustain the trial judge's finding of pain and suffering prior to death, the court of appeals recognized that the evidence shows that Mr. Monk was last seen in his cabin approximately 15 minutes prior to explosion (R. 1353-1354) and that his remains were found at the furtherest forepeak of the vessel (R. 430). We believe it was a permissible conclusion by the district court that Mr. Monk was alerted by the explosion and attempted to flee from the fire seeking refuge at the place aboard the vessel furtherest from the fire. We further believe it a reasonable conclusion that in so doing and in so dying he suffered pain and mental anguish. The ground of reversal stated by the Court of Appeals was that the conclusion of the trial judge was speculative. In this regard, we respectfully submit that the Court of Appeals simply substituted its own judgment for that of the district court charged with the responsibility of hearing the evidence and deciding the case. Thus, the Court of Appeals went far beyond the clearly erroneous standard. We respectfully request that this portion of the Court of Ap-

peals' decision likewise be reviewed, and upon review, be reversed.

Respectfully submitted,

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Certificate of Service

Copies of the foregoing Petition for Writ of Certiorari have been served this 2nd day of July, 1975, on the following counsel of record:

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SIDNEY RAVKIND

APPENDIX A

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 70-H-1171
AND CONSOLIDATED CASES

WEBSTER BARNWELL ARMSTRONG, III, ET AL
v.
CHAMBERS & KENNEDY, ET AL

In the Matter of the
Following Cases From

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
LAFAYETTE DIVISION

CIVIL ACTION NO. 16305
71-H-626

LEO MEAUX, ADMR. OF THE ESTATE AND
SUCCESSION OF EUGENE MEAUX, ET AL
v.
CHAPMAN CONTRACTING SERVICE COMPANY,
INC., ET AL

CIVIL ACTION NO. 16401
71-H-686

LEO MEAUX, JR.
v.
CHAMBERS & KENNEDY, ET AL

CIVIL ACTION NO. 16404
71-H-627

ROY MELANCON
v.
DRILLING ENGINEERING, INC., ET AL

CIVIL ACTION NO. 15878
71-H-625

CLEMILLE CREDEUR, ET AL
v.
TRAVELERS INSURANCE COMPANY, ET AL

INTERLOCUTORY JUDGMENT

The above-captioned causes from the United States District Court, Western District of Louisiana, Lafayette Division, having been transferred to the United States District Court for the Southern District of Texas, Houston Division, for trial on the issue of liability only, and being consolidated with Civil Action No. 70-H-1171, Webster Barnwell Armstrong. III, et al. v. Chambers & Kennedy, et al. for this purpose, and after hearing the evidence and receiving the briefs and arguments of counsel a Memorandum and Order was filed by the court on March 7, 1972, which constitutes the Findings of Fact and Conclusions of Law on all issues of liability, and is made a part of this judgment, it is

ORDERED, ADJUDGED and DECREED that plaintiffs in the said captioned causes asking damages for the deaths of Eugene Meaux and Franklin J. Credeur and for personal injuries to Roy Melancon and Leo Meaux shall each have and recover from Chambers & Kennedy and

Drilling Engineering, Inc., jointly and severally, their provable damages as determined by the laws of the State of Texas under provision of the Outer Continental Shelf Lands Act (43 U.S.C. 1333), and

ORDERED, ADJUDGED and DECREED that Home Indemnity Company shall have and recover out of such damages as are awarded to the several plaintiffs in these causes the amounts of its several liens for compensation paid and medical expenses incurred, under provisions of the Longshoremen's and Harborworkers' Compensation Act, because of such deaths and injuries, and

ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and be entitled to full indemnity from Drilling Engineering, Inc., for all amounts it shall be required to pay in damages for the deaths of Eugene Meaux and Franklin J. Credeur and for the injuries to Roy Melancon and Leo Meaux.

ORDERED, ADJUDGED and DECREED that all other relief prayed for in the said captioned causes is expressly denied.

It is further ORDERED that the said captioned causes are hereby remanded to the United States District Court for the Western District of Louisiana, Lafayette Division, for further hearing on the issues of damages.

DONE at Houston, Texas, on this the 18th day of April, 1972.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 70-H-1171

WEBSTER BARNWELL ARMSTRONG, III, ET AL
v.
CHAMBERS & KENNEDY, ET AL

CIVIL ACTION NO. 70-H-713

CHAMBERS & KENNEDY
v.
DRILLING ENGINEERING, INC.

CIVIL ACTION NO. 71-H-1348

HYDROTECH SERVICES, INC.
v.
W. D. KENNEDY, ET AL

GALVESTON DIVISION

CIVIL ACTION NO. 71-G-3
71-H-567

LUCILLE MONK, ET AL
v.
CHAMBERS & KENNEDY, ET AL

CIVIL ACTION NO. 70-G-113
71-H-755

IN THE MATTER OF THE
COMPLAINT OF DEARBORN MARINE SERVICE
INC., C-W-D, INC., THOROUGBRED MARINE
SERVICES INC. and FREEPORT OPERATORS, INC.
for exoneration from or Limitation of Liability of the Oil
Screw "CARRYBACK"

FINAL JUDGMENT

The above-captioned causes, and the interventions therein, were consolidated for trial in this court, and after hearing the evidence and receiving the briefs and arguments of counsel, a Memorandum and Order was filed by the court on March 7, 1972, which constitutes the Findings of Fact and Conclusions of Law on all issues of liability, and is made a part of this judgment.

In separate hearings on the issues of damages, the court further found and determined as follows:

The damages resulting by reason of the death of Webster Barnwell Armstrong, Jr., including damages for his conscious pain and suffering, were in the total sum of One Hundred Thousand Dollars ($100,000). The reduction by 25% for his contributory negligence leaves the net amount of those damages to be Seventy-five Thousand Dollars ($75,000). The division of these damages has been established by the approval of awards to the heirs and dependents of Webster Barnwell Armstrong, Jr., in a pretrial settlement.

The damages resulting by reason of the death of William A. Love were in the total sum of Two Hundred Thousand Dollars ($200,000). The division of these damages has been established by the approval of awards to the heirs and dependents of William A. Love in a pretrial settlement.

The damages resulting by reason of the death of Francis Andrew Cassel were in the total sum of One Hundred Thousand Dollars ($100,000). The division of these damages has been established by the approval of awards to the heirs and dependents of Francis Andrew Cassel in a pretrial settlement.

The damages resulting by reason of the death of J. B. Gaspard were, by stipulation of counsel, in the total sum of One Hundred Seventy-nine Thousand Eight Hundred Sixty-two and 50/100 Dollars ($179,862.50). The Home Indemnity Company has a right of subrogation against this recovery in the amount of $4,862.50, plus any additional amounts paid by it after January 11, 1972, for compensation paid under the Longshoremen's and Harborworkers' Act; $25,000 is to be paid into the registry of the court for the use and benefit of Leonard James Gaspard, minor son of the decedent; and the remainder of the recovery is awarded to Mary V. Gaspard.

The damages resulting by reason of the injuries to Ronald Breaux were, by stipulation of counsel, in the total sum of Eighteen Thousand Four Hundred Thirty-three Dollars ($18,433). The Home Indemnity Company has a right of subrogation against this recovery in the amount of $3,433.50, plus any additional amounts paid by it after January 11, 1972, for compensation and medical expense paid under the Longshoremen's and Harborworkers' Compensation Act.

The damages resulting by reason of the death of Wiliam C. Monk, including damages for his conscious pain and suffering, were in the total sum of Four Hundred Eight Thousand One Hundred Fifty-eight and 67/100 Dollars ($408,158.67). The reduction by 25% for his contributory negligence leaves the net amount of those damages to be Three Hundred Six Thousand One Hundred Nineteen Dollars ($306,119). The Hartford Accident Indemnity Company has a right of subrogation against this recovery in the amount of $4,530, plus any additional amounts paid by it after July 15, 1971, for compensation paid under the Longshoremen's and Harbor-

workers' Compensation Act; payments shall be made into the registry of the court for the use and benefit of the minor children of this decedent as follows: Douglas Brian Monk, $20,000; Sandra K. Monk, $15,000; Richard W. Monk, $20,000; and Elizabeth Lorene Monk, $20,000; and the remainder of the recovery is awarded to Lucille Monk, individually and as personal representative of the Estate of William C. Monk.

Damages resulting from the loss of or damage to property and expenses incidental thereto, were as follows:

Chambers & Kennedy	$285,000.00
Hydrotech Services	$ 4,789.93
Black Equipment Company	$ 31,472.62

Thoroughbred Marine Services, Inc., and Dearborn Marine Services, Inc., for the damage to the M/V CARRYBACK, $129,500, to be reduced by 25% for contributory negligence to the net amount of $97,125.

Dearborn Marine Services, Inc., is further entitled to a contractual recovery for charter hire in the further amount of $10,738.82 for the services of M/V CARRYBACK and M/V PECTON.

It is therefore,

ORDERED, ADJUDGED and DECREED that as Chambers & Kennedy, Drilling Engineering, Inc., Chapman Contracting Service Company, Inc., and the Dearborn Group (Dearborn Marine Services, Thoroughbred Marine Services, Inc., C-W-D, Inc., and Freeport Operations, Inc.) are liable for 25% of the damages awarded

for the death of Armstrong, the assignees of that cause of action, Chambers & Kennedy and Drilling Engineering, Inc., jointly, shall have and recover from Chapman Contracting Service Company, Inc., the sum of $18,750 as its one-fourth of those damages, and from the Dearborn Group the sum of $18,750, representing its one-fourth share of those damages. And it is further ORDERED, ADJUDGED and DECREED that the Dearborn Group shall have and be entitled to indemnity from Chapman Contracting Service Company, Inc., for the amount of $6,250 adjudged as Chapman's portion of the indemnity due to Dearborn, Drilling Engineering, Inc., will indemnify Dearborn in the amount of $6,250 for Armstrong's damages, and C & K will indemnify Dearborn in the amount of $6,250; and Chambers & Kennedy shall have and be entitled to recover from Drilling Engineering, Inc., the sum of $25,000, representing Drilling Engineering, Inc.'s obligation to indemnify Chambers & Kennedy for its share of the damages for the death of Captain Armstrong. It is, further,

ORDERED, ADJUDGED and DECREED that as Chambers & Kennedy, Drilling Engineering, Inc., Chapman Contracting Service Company, Inc., and the Dearborn Group (Dearborn Marine Services, Thoroughbred Marine Services, Inc., C-W-D, Inc., and Freeport Operators, Inc.) are each liable for 25% of the damages awarded for the deaths of Love and Cassel, the assignees of those causes of action, Chambers & Kennedy and Drilling Engineering, Inc., jointly, shall have and recover from Chapman Contracting Service Company, Inc., the sum of $75,000 as its one-fourth of those damages, and from the Dearborn Group the sum of $75,000 as its one-fourth of those damages. And it is further,

ORDERED, ADJUDGED and DECREED that Chambers & Kennedy have and recover of and from Drilling Engineering, Inc., the sum of $75,000, representing Drilling Engineering, Inc.'s obligation to indemnify Chambers & Kennedy for its one-fourth share of the damages for the deaths of Love and Cassel; and it is, further,

ORDERED, ADJUDGED and DECREED that Mary V. Gaspard, individually and as personal representative of the Estate of J. B. Gaspard, and as next friend of Leonard James Gaspard, a minor, shall have and recover from Chambers & Kennedy and Drilling Engineering, Inc., jointly and severally, as damages for the death of J. B. Gaspard, the sum of $179,862.50, out of which Home Indemnity Company shall have and be entitled to recover the amount of its subrogation as before stated, and $25,000 shall be paid into the registry of this Court for the use and benefit of the minor, Leonard James Gaspard. And it is, further, ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and be entitled to full indemnity from Drilling Engineering, Inc., for all amounts it may be required to pay because of these damages awarded for the death of J. B. Gaspard. It is, further,

ORDERED, ADJUDGED and DECREED that Ronald Breaux shall have and recover from Chambers & Kennedy and Drilling Engineering, Inc., jointly and severally, the amount of $18,433 as damages for his personal injuries, out of which Home Indemnity Company shall have and be entitled to recover the amount of its subrogation as before stated. And it is, further, ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and be entitled to full indemnity from Drilling Engineering, Inc., for all amounts it may be required to pay be-

cause of these damages awarded Ronald Breaux. It is, further,

ORDERED, ADJUDGED and DECREED that Lucille Monk, individually and as personal representative of the Estate of William C. Monk, Deceased, and as next friend of the minors, Douglas Brian Monk, Sandra Kay Monk, Richard William Monk, and Elizabeth Lorene Monk, shall have and recover from Chambers & Kennedy, Chapman Contracting Service Company, Inc., and the Dearborn Group, jointly and severally, as damages for the death of William C. Monk, the sum of $306,119, out of which Hartford Accident Indemnity Company shall have and be entitled to recover the amount of its subrogation as before stated, and payments shall be made into the registry of the court for the use and benefit of Douglas Brian Monk, in the amount of $20,000, of Sandra K. Monk in the amount of $15,000, of Richard W. Monk in the amount of $20,000, and of Elizabeth Lorene Monk in the amount of $20,000. And it is, further, ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and be entitled to full indemnity from Drilling Engineering, Inc., for all amounts it may be required to pay because of these damages awarded for the death of William C. Monk, and Drilling Engineering, Inc., shall have and be entitled to full indemnity from the Dearborn Group for all amounts it may be required to pay to fulfill its said obligation to indemnify Chambers & Kennedy for these damages awarded for the death of William C. Monk. It is, further,

ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and recover from Drilling Engineering, Inc., the sum of $169,650 as indemnity for the amounts paid by Chambers & Kennedy for settlement

of the claims arising from the deaths of Shelton Nunez and Doris Campbell and of the personal injury claims of Russel Bertrand, Wayne Clark, Richard Benoit, Sr., Donald Vincent, John A. Bertrand, Kenneth W. Vandenstein, Nelson Hanks, Doyle and Wilfred Woods, Lawrence Theriot and Lawrence Bertrand. And it is, further, ORDERED, ADJUDGED and DECREED that Home Indemnity Company shall have and recover from Chambers & Kennedy and Drilling Engineering, Inc., jointly and severally, the sum of $4,900 as its right of subrogation against damages paid for the death of Shelton Nunez, and the sum of $5,250 as its right of subrogation against damages paid for the death of Doris Campbell, under provisions of the Longshoremen's and Harborworkers' Compensation Act, and that Chambers & Kennedy shall have and be entitled to indemnity from Drilling Engineering, Inc., for any amounts it may be required to pay Home Indemnity Company on this account. It is, further,

ORDERED, ADJUDGED and DECREED, pursuant to agreement between the parties and stipulation before trial that Chapman Contracting Service Company, Inc., would pay the total sum of $100,000 for the full and final satisfaction of all liability it might have to any parties for property damage, that Chambers & Kennedy, the Dearborn Group, Black Equipment Company and Hydrotech Services jointly do have and recover from Chapman Contracting Service Company, Inc., for their property damage claims the sum of $100,000, which shall be divided as follows: Chambers & Kennedy to receive $63,230, Dearborn Group to receive $28,720, Black Equipment Company to receive $6,990, and Hydrotech Services to receive $1,060. It is further,

ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and recover from Drilling Engineering, Inc., for its property damages, the sum of $285,000, less any amount received by Chambers & Kennedy out of the recovery from Chapman Contracting Service Company, Inc., for these damages. It is, further,

ORDERED, ADJUDGED and DECREED that Hydrotech Services shall have and recover from Chambers & Kennedy and Drilling Engineering, Inc., jointly and severally, for its property damage, the sum of $4,789.93, less any amount received by Hydrotech Services from Chapman Contracting Service Company, Inc., for these damages. And it is further, ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and be entitled to full indemnity from Drilling Engineering, Inc., for all amounts which it shall have been required to pay to Hydrotech Services for these damages. It is, further,

ORDERED, ADJUDGED and DECREED that Black Equipment Company shall have and recover from Chambers & Kennedy and Drilling Engineering, Inc., jointly and severally, for its property damage the sum of $31,-472,62, less any amount received by Black Equipment Company from Chapman Contracting Service Company, Inc., for these damages. And it is, further, ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and be entitled to full indemnity from Drilling Engineering, Inc., for all amounts which it shall have been required to pay to Black Equipment Company for these damages. It is further,

ORDERED, ADJUDGED and DECREED that the Dearborn Group, as heretofore designated, shall have and recover from Chambers & Kennedy and Drilling Engineering, Inc., jointly and severally, for its property damages, the sum of $97,125, less any amount received by the Dearborn Group out of the recovery from Chapman Contracting Service Company, Inc., for these damages. And it is, further, ORDERED, ADJUDGED and DECREED that Chambers & Kennedy shall have and be entitled to full indemnity from Drilling Engineering, Inc., for all amounts which it shall have been required to pay to the Dearborn Group for these damages. It is further, ORDERED, ADJUDGED and DECREED that Chapman Contracting Service Company, Inc., recover from Chambers & Kennedy the amount of $7,313.25 for services supplied to the time of the casualty. It is, further,

ORDERED, ADJUDGED and DECREED that Dearborn Marine Services, Inc., shall have and recover from Chambers & Kennedy the sum of $10,738.82 for the service of the M/V CARRYBACK and the M/V PECTON. It is, further,

ORDERED, ADJUDGED and DECREED that the petition of Dearborn Marine Service, Inc., C-W-D, Inc., and Thoroughbred Marine Services, Inc., for limitation of liability is denied. It is, further,

ORDERED, ADJUDGED and DECREED that all other relief prayed for in the captioned cases and not granted herein is expressly denied. A separate and interlocutory judgment is being entered as to other cases tried contemporaneously on the issue of liability. It is, further,

ORDERED, ADJUDGED and DECREED that Mr. Edward Murr is awarded a fee of $2,500 for his services as attorney ad litem for the minor plaintiff children of

Armstrong, Love, Cassel, Gaspard and Monk, which is taxed as costs of court to be paid equally by Chambers & Kennedy, Drilling Engineering, Inc., Chapman Contracting Service Company, Inc., and the Dearborn Group. It is, further,

ORDERED, ADJUDGED and DECREED that no attorney's fees shall be taken from the payments directed to be made into the registry of this court for the use and benefit of the minor plaintiffs, and these deposits shall be retained by the clerk subject to the further orders of the court. It is, further,

ORDERED, ADJUDGED and DECREED that excepting as otherwise expressly provided all parties shall bear their own costs of court. And it is, further,

ORDERED, ADJUDGED and DECREED that all amounts awarded by this judgment shall bear interest at the rate of six (6) per cent per annum from the date of this judgment until paid.

DONE at Houston, Texas, on this the 18th day of April, 1972.

/s/ JOHN V. SINGLETON, JR.
United States District Judge

APPENDIX B

In the Matter of the Complaint of DEARBORN MARINE SERVICE, INC., et al., for Exoneration from or Limitation of Liability of the OIL SCREW CARRYBACK
Webster Barnwell ARMSTRONG, III Individually, Etc., et al., Plaintiffs-Appellees,
v.
CHAMBERS & KENNEDY et al.,
Defendants-Appellees-Appellants

Esther M. LOVE, Intervenor-Appellant-Appellee.

No. 72-2704.

United States Court of Appeals,
Fifth Circuit.

Aug. 22, 1974.

Consolidated suits arising out of an offshore oil platform explosion and fire which extended to a vessel moored to the platform. The United States District Court for the Southern District of Texas, John V. Singleton, Jr., J., 340 F.Supp. 1220, entered judgments against the platform owner, platform operator, vessel owner, and supplier of labor to the platform which was being refurbished at the time of the accident, and appeals were taken. The Court of Appeals, Godbold, Circuit Judge, held, inter alia, that (1) the wrongful death action brought against oil platform owner and labor supplier by estate of platform operator's supervisor, who died when the platform fire enveloped nearby vessel on which the supervisor was doing office work, was governed by the land law of Texas, meaning that the Texas doctrine of contributory negligence barred recovery by the supervisor's heirs; however,

the estate's claim against the vessel owner was within admiralty jurisdiction, (2) owner of the vessel breached a legal duty owing to the supervisor where the vessel skipper negligently moored his ship with a 75-foot rope to the oil platform's leeward side, in disregard of the hazardous proximity of the ship to potential fires and possible explosions stemming from welding work being done on the platform, and (3) statute imposing manning and certification requirements on vessels of above 15 tons "carrying passengers for hire" is not limited to public conveyances of passengers.

Affirmed in part, reversed in part, and remanded with directions.

Appeals from the United States District Court for the Southern District of Texas.

Before AINSWORTH, GODBOLD and INGRAHAM, Circuit Judges.

GODBOLD, Circuit Judge:

This consolidated litigation arises out of an offshore oil platform explosion that occurred May 28, 1970, over the outer Continental Shelf and caused extensive property damage and loss of human life on the platform and on a nearby vessel. The normal complexities engendered by such holocaust are multiplied by the part-platform, part-admiralty factual context which necessitates meshing together the law of admiralty and the state law made the surrogate law of the platform by Rodrigue v. Aetna Cas. & Surety Co., 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).

The site of the explosion was an unmanned oil collection and storage platform located in the Gulf of Mexico twelve miles off the coast of Galveston, Texas and permanently affixed to the subsoil of the outer Continental Shelf. It was owned by Chambers and Kennedy (C & K), was maintained and operated by Drilling Engineering, Inc. (DEI) on behalf of C & K under a well-servicing contract, and it consisted primarily of five oil storage tanks with a capacity of 1,000 barrels each and one smaller tank. In March 1970, an agent of the Geological Survey[1] wrote to C & K requesting that it bring its platform into compliance with various safety and pollution regulations.[2] At this time the platform was in a generally deteriorated condition, some of the lateral braces were severely rusted, many of the boards were rotten or oil soaked, it was in need of painting, and in places the floor of the platform was warped. On April 10 C & K shut down production from the satellite wells whose production had been pumped into the tanks for storage, and the next day a barge transported to shore all oil then in the tanks.

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1. The Secretary of the Interior has charged the Director of the Geological Survey with administering certain regulations relating to conservation of natural resources on the outer Continental Shelf. The pertinent regulations are at 30 C.F.R. §§ 250.1-250.100.

2. One regulation mentioned was 30 C.F.R. § 250.46, which provides:

> "The lessee shall perform all operations in a safe and workmanlike manner and shall maintain equipment for the protection of the lease and its improvements, for the health and safety of all persons, and for the preservation and conservation of the property and the environment. The lessee shall take all necessary precautions to prevent and shall immediately remove any hazardous oil and gas accumulations or other health, safety or fire hazards."

Pursuant to its well-servicing contract with C & K, DEI began making the required alterations and repairs. DEI furnished a supervisor for the job and contracted with a labor supply firm to furnish pipefitters, welders, painters, and roustbouts. The work consisted of painting, sandblasting, and some "hot work," such as cutting with acetylene torches and welding. The hot work was generally done at an elevated heliport or at the perimeter of the platform away from the tanks. Since the platform was unmanned it was necessary that there be daily transportation from shore to platform and back to shore for those engaged in and supervising the work. Also, of course, various materials, supplies and equipment had to be transported to and from shore. Commencing May 3 or 4 and pursuant to an oral arrangement between DEI and Dearborn, the nature and consequences of which we will discuss later, the vessel serving these purposes was the CARRYBACK, an all steel, eighty-five foot vessel of 136 gross tons, powered by 670 h. p. twin diesels, having fifteen seats for passengers, and owned by Dearborn.[3] Each day for the period after it arrived from shore and until it returned to shore the CARRYBACK remained in the vicinity of the platform, acting as a service and standby vessel. She carried a galley, cook and food and served meals to platform workmen as desired. She had toilets aboard—there were none on the platform— and workers could come aboard her to use them. The DEI supervisor, Monk, came aboard her to do office work where he could be away from the wind and noise of the platform and in air-conditioned

3. Initially, for a few days, the vessel serving these purposes under the DEI-Dearborn oral arrangement was Dearborn's M/V PICTEN, a somewhat smaller boat. The CARRYBACK was substituted because a larger and more maneuverable boat was needed.

surroundings. He was permitted to use her ship to shore radio with the permission of the captain. By May 25, labor for the alteration and repair work was being supplied by Chapman Contracting Service (Chapman).

Between April 10, when C & K had shut down production from the satellite wells, and May 25, and for reasons not disclosed in the record, the tanks collected about 1,100 barrels of oil. DEI's jobsite supervisors, Rick Chapman of Chapman Contracting, and other executives of C & K and DEI knew that the tanks contained oil.

On May 27 representatives of the Geological Survey advised Monk, DEI's supervisor at the platform, that to comply with antipollution guidelines he would have to remove a valve from one of the equalizing lines between tanks. This was the first job to require breaking a connection leading directly to the oil storage tanks. Monk discussed the procedure with Overly, Chapman's supervisor at the platform, and on the morning of May 28 he discussed it with Rick Chapman, who had flown to the platform by helicopter to survey the work. The District Court[4] reconstructed the attempts of May 28 to remove the valve:

> . . . Mr. Overly instructed Mr. Scanlan, a pusher for Chapman, to remove the valve from the equalizer line. Mr. Scanlan, along with the two other Chapman employees, began working on the equalizer line and broke the union and cut the pipe with a pipe cutter. They took out the valve leaving a part of the equalizer line protruding in place. They then proceeded to take the valve and the other part of the equalizer line to the south end of the plat-

4. Its opinion is reported as Armstrong v. Chambers & Kennedy, 340 F.Supp. 1220 (S.D. Tex. 1972).

form beneath the heliport and there fabricated, or threaded a new piece of pipe called a nipple to put back in the equalizer line and reconnect it. Mr. Scanlan then went back to the equalizer line and screwed the new nipple in place. This procedure left two pieces of pipe to be connected together. Mr. Scanlan talked to Mr. Monk and told Mr. Monk that he was going to connect these two pieces by welding them. The facts do not reflect where this conversation took place—whether on the platform or on the *Carryback*. The facts do not indicate whether or not Mr. Monk told Mr. Scanlan to weld the line *in place* [or on the edge of the platform away from the tanks], or whether Mr. Scanlan told Mr. Monk he was going to weld the line in place. But the facts do reflect that at some time before the explosion Mr. Scanlan told Mr. Monk he was going to weld the line.

> Mr. Scanlan told Mr. Gaspard, a Chapman welder, and Mr. Breaux, a welder's helper, to weld together the two pieces of pipe that now constituted the equalizer line . . . . Mr. Gaspard began the welding and at the time that he struck an arc, there was an explosion. Burning oil then rapidly spread fire across the platform, resulting in [death and] injuries and damage there.

340 F. Supp. at 1231-1232 (emphasis in original).

The CARRYBACK was just downwind of the explosion, tied to the platform on a seventy-five foot line with her stern toward the platform. With the explosion a flaming ball of oil rose above the platform and was carried by a wind of about eight knots to a point directly over the CARRYBACK, where it descended "as if it were an exploding bomb" and "instantaneously

wrapped [her] in consuming fire". In only minutes all aboard perished—Captain Armstrong, the master; crew members Love and Cassel; and Monk, DEI's supervisor. The vessel was reduced to scrap metal. Of approximately twenty workers on the platform five were killed.

Dearborn filed a petition for limitation of or exoneration from liability in the United States District Court for the Southern District of Texas, Galveston Division, and answers and claims in this proceeding were filed by DEI, C & K, the heirs of Monk, Cassel, Love, and Armstrong, and by several platform workers and heirs of platform workers. In Texas state court Monk's estate sued C & K and Freeport Operators (Dearborn's subsidiary) who removed the cause to the federal District Court in Galveston. Suits in the same District Court, Houston Division, were filed by C & K against DEI and Chapman for damages to its platform, and by the heirs of Armstrong against C & K, DEI, Chapman, and Freeport Operators. The limitation proceedings in the Galveston Division were subsequently consolidated with the Houston suits for trial in the Houston Division, and it is from judgment entered in these consolidated proceedings after a trial without a jury that this appeal is taken. The posture of the parties under the judgment (excluding awards of indemnity) can be summarized this way, insofar as pertinent to this appeal.

"Platform Defendants"

C & K: Owner of the platform. Violated safety regulations.

DEI: Operator of the platform. Violated safety regulations.

Chapman: Labor supplier. Negligent.

Other Defendant

Dearborn: Owner of the CARRYBACK. Negligence and unseaworthiness.

Claims[5]

Love and Cassel: Crew members killed aboard the CARRYBACK.

Captain Armstrong: Master, killed aboard the CARRYBACK.

Monk: DEI supervisor, killed aboard the CARRYBACK.

Property damage: Loss of CARRYBACK.

Liability

C & K, Chapman, DEI and Dearborn:
Liable for deaths of Love and Cassel (no contributory fault by Love or Cassel). Liable for death of Captain Armstrong (25% contributory fault).
C & K, DEI and Chapman:
Liable for loss of CARRYBACK (25% contributory fault by vessel).
C & K, Chapman and Dearborn:
Liable for death of Monk (25% contributory fault).[6]

5. Claims of persons injured or killed on the platform, or in the sea after jumping from the platform, have been either settled or reduced to judgment and satisfied and are not before us. Nor is the matter of damage to the platform before us.

6. Monk's heirs did not sue his employer DEI.

The District Court held C & K had breached a nondelegable duty imposed by regulations promulgated under the Outer Continental Shelf Lands Act to maintain a safe offshore platform.[7] DEI was found negligent in its supervision of platform operations. DEI employees specifically mentioned were Monk, the platform supervisor at the time of explosion, and Chenier, Monk's superior, neither of whom "adequately warn[ed] Chapman and its employees of the dangers incident to removal of the equalizer line."[8] Chapman was held negligent because of Rick Chapman's failure to warn his employees of the presence of oil in the tanks and for inadequate supervision of the

7. The District Court cited 30 C.F.R. §§ 250.45 and 250.46. Section 250.46 is set out in note 2 *supra*. Section 250.45 provides:

> "In the conduct of all its operations, the lessee shall take all steps necessary to prevent accidents and fires, and the lessee shall immediately notify the supervisor of all serious accidents and all fires on the lease, and shall submit in writing a full report thereon within 10 days. The lessee shall notify the supervisor within 24 hours of any other unusual condition, problem, or malfunction."

The District Court further reasoned: "Even if this nondelegable duty were not set by statute, the court would have to impose it. . . . [T]he duty placed here upon the oil lease is similar to the traditional tort duty of one using an ultrahazardous substance." 340 F.Supp. at 1234.

8. The District Court listed four specific acts of negligence by DEI:

> "(1) [failure] to suspend all burning and welding operations while the equalizer line was open as a result of the removal of a section of the line;
> "(2) [failure] to seal this opening until that section of the line had been replaced;
> "(3) [failure] to carefully supervise the removal and reinstallation of the line to see that no welding or other work that could possibly produce an ignition would be undertaken in the performance of this operation; and
> "(4) [failure] to post warning signs on the tanks with instructions that no welding or hot work be done in this area."

340 F.Supp. at 1236.

welding by Scanlan, Chapman's pusher.[9] The District Court found that these breaches of duty by Chapman, C & K, and DEI combined with the faults of Dearborn to proximately cause the deaths, injuries, and property damage in issue.

Dearborn was found to have breached its legal responsibilities in several respects. The District Court found that her master was negligent in mooring her in an unreasonably hazardous location. It found the vessel unseaworthy for being moored as she was, for failure to comply with 46 U.S.C. § 404, which imposes certain manning and inspection requirements on vessels "carrying passengers for hire," and for being manned by an incompetent crew. These acts of negligence and conditions of unseaworthiness, the District Court found combined with the acts of the platform defendants to proximately cause the deaths of those aboard the CARRYBACK and the loss of the vessel itself.

Chapman contests the District Court's rulings on its negligence. Dearborn contests the rulings on its negligence and unseaworthiness. C & K and DEI do not contest findings of fault on their part but contest certain legal consequences thereof.

[1] Monk's heirs sought to maintain their suit against Dearborn for negligence and unseaworthiness under the general maritime law and the Death on the High Seas Act, 46 U.S.C. §§ 761-768. Representatives of the deceased crew members added to these contentions a claim

9. The workers could have easily verified the presence of oil by visual inspection through a hatch at the top of each tank or by use of a device called a "sniffer." Testimony indicated that hot work on the platform should have been postponed until the oil was removed from the tanks and their interiors scrubbed with salt water.

for negligence under the Jones Act, 46 U.S.C. § 688.[10] All four estates alleged that DOHSA and the general maritime law provide a federal cause of action against the platform defendants—C & K, DEI, and Chapman[11]—but, as we will explore later, there is a question whether these claims fall within § 1333 of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 et seq., which prescribes the applicable law for the subsoil of the outer Continental Shelf and for artificial islands permanently affixed thereto. For the present we need only observe that the death claims against all defendants were properly in federal district court under either the Jones Act or DOHSA or fell within the Lands Act.[12]

There are two main issues—whether land law or admiralty law covers the claim of Monk against Dearborn, and whether manning and inspection requirements of federal statutes and regulations apply to the CARRYBACK. Determination of the second of these bears on the findings that Dearborn was negligent and the CARRYBACK unseaworthy, which in turn may affect, at least, limitation of liability, relative fault between the defendants, and the extent of Monk's comparative fault. Un-

10. Seamen have alternative remedies against their employers under the Jones Act for negligence and DOHSA for unseaworthiness. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 396 n. 12, 90 S.Ct. 1772, 1785 n. 12, 26 L.Ed.2d 339, 354 n. 12 (1970); Doyle v. Albatross Tanker Corp., 367 F.2d 465 (C.A. 2 1966).

11. Except, as already pointed out, Monk's heirs did not sue his employer, DEI.

12. The District Court found that general maritime law applied to the death actions, citing Moragne v. State Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), which concerned a death in state waters. Whether *Moragne* applies on the high seas is an issue not yet decided by this court and not briefed by the parties, and we do not consider it.

tangling these skeins and setting out various alternatives would require a catalogue of instructions to the District Court on remand that would be neither useful nor practical. We therefore decide the issues presented as best we can, vacate the judgment of the District Court, and remand for further proceedings.

1. Consolidation

[2, 3] A threshold question is whether the District Court correctly consolidated Dearborn's limitation petition, filed pursuant to 46 U.S.C. § 185, with the Armstrong death action for trial in Houston. District courts have broad discretion under Fed. R. Civ. P. 42(a) to consolidate causes pending in the same district. *See generally* 9 Wright & Miller, Federal Practice & Procedure § 2384, at 272 (1971). In this case there was no jurisdictional impediment to consolidation because both the Armstrong suit and the limitation proceeding independently invoked federal jurisdiction.[13] Since the actions presented common issues of law and fact, consolidation saved the parties from wasteful relitigation in disparate forums, avoided duplication of judicial effort, and did not prejudice Dearborn's right to prove entitlement to limitation. The District Court did not abuse its discretion in ordering consolidation.[14]

13. Jurisdiction over Armstrong's suit was under the Death on the High Seas Act, 46 U.S.C. §§ 761-768, and the Jones Act, 46 U.S.C. § 688. Dearborn's limitation petition was properly in federal district court under 46 U.S.C. § 185.

14. With the unification of admiralty and civil procedure, suits in admiralty have even been consolidated with civil actions at law when the effect was to force issues in the admiralty action to be tried to a jury. See Blake v. Farrell Lines, Inc., 417 F.2d 264 (C.A. 3, 1969); 5 Moore, Federal Practice ¶ 42.02, at 42-11 to 42-13 (2d ed. 1971) (main volume and cumulative supplement).

2. The governing law and Monk's contributory negligence.

The District Court found Dearborn, Chapman, and C & K jointly and severally liable for the death of Monk, DEI's supervisor. Monk was basically a platform worker, but he spent part of his time aboard the CARRYBACK, completing his work reports and using the ship's shortwave radio to communicate with DEI's shoreside office. He was on the CARRYBACK when the explosion occurred. The court found that Monk's inadequate supervision of platform operations contributed to his death to the extent of 25%. The District Court recognized that under *Rodrigue Texas* law applied to platform-based deaths and injuries, but reasoned that because Monk died at sea the claim for his death, as against all defendants, was within maritime jurisdiction. Accordingly it applied admiralty's beneficent doctrine of comparative negligence to permit recovery by the Monk heirs against Dearborn, Chapman and C & K, reduced by 25%.

[4] Under Texas law contributory negligence is a bar to recovery in a negligence action. "The doctrine of comparative negligence, which apportions liability between the parties according to the relative degree of their negligence, does not exist in Texas, except by virtue of statute in actions between certain employers and their employees." 40 Tex. Jur. 2d Negligence § 97, at 602-03 (1962) (footnotes omitted).[15]

15. Texas courts have applied the comparative negligence doctrine to suits for death in state territorial water of *Sieracki* seamen. See Vassallo v. Nederl-Amerik Stoomv Maats Holland, 162 Tex. 52, 344 S.W.2d 421 (1961). *Vassallo* was a suit within maritime jurisdiction in which the Texas death statutes were borrowed to provide a vehicle for recovery, but the Texas court chose to apply substantive maritime principles. This borrowing was necessitated by The Harrisburg, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886) [overruled

[5] Chapman and C & K—the two platform defendants held liable on the Monk claim—vigorously urge that as against them Texas law controlled so that Monk's contributory negligence barred the claim for his death. For reasons discussed below we conclude that the land law of Texas, the surrogate law for the platform, does control as between these parties with the result that the Monk claim against C & K and Chapman is barred.[16]

The death claim for Monk, who perished about seventy-five feet downwind of the platform, presents a jurisdictional conflict between the Death on the High Seas Act and the Outer Continental Shelf Lands Act. DOHSA provides in pertinent part: "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, . . . the personal representative . . . may maintain a suit for damages . . . in admiralty . . . ." 46 U.S.C. § 761.[17] The Lands Act extends the

in Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970)], which held that general maritime law did not permit recovery for wrongful death. For suits to which substantive principles of Texas law are applicable, however, contributory negligence has traditionally barred recovery.

Texas recently enacted a modified comparative negligence statute. Tex. Laws 1973, ch. 28, § 1, at 41. It applies only to causes of action arising after September 1, 1973.

16. We reject as meritless, without any necessity for discussion, the argument of the Monk heirs that C & K and Chapman did not adequately raise contributory negligence as an issue, and that if the District Court erred in ruling on the effect of Monk's contributory negligence it was enticed into error by C & K and Chapman, who may not complain of it on appeal.

17. DOHSA has been construed to confer admiralty jurisdiction over claims arising out of airplane crashes on the high seas though the negligence alleged to have caused the crash occurred on land. See Stiles v. National Airlines, Inc., 161 F.Supp. 125 (E.D. La. 1958), aff'd, 268 F.2d 400 (C.A. 5), cert. denied, 361 U.S. 885, 80 S.Ct. 157, 4 L.Ed.2d 121 (1959); Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631 (C.A. 8, 1972); Noel v. Airponents, Inc., 169 F.Supp. 348 (D.N.J. 1958). *See generally Annot.*, 66 A.L.R. 2d 1002 (1959).

political jurisdiction of the United States "to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures . . . erected thereon," 43 U.S.C. § 1333(a)(1), and then provides in relevant part:

> To the extent that they are applicable and not inconsistent . . . with other Federal laws . . . the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . .

Id. at § 1333(a)(2).

In a line of decisions beginning with Pure Oil Co. v. Snipes, 293 F.2d 60 (C.A. 5, 1961), this circuit construed § 1333 of the Lands Act to make federal maritime law, as supplemented by state laws, applicable to injuries occurring on island-platforms on the outer Continental Shelf. See Loffland Bros. Co. v. Roberts, 386 F.2d 540 (C.A. 5, 1967), cert. denied, 389 U.S. 1040, 88 S.Ct. 778, 19 L.Ed.2d 830 (1968); Ocean Drilling & Exp. Co. v. Berry Bros. Oilfield Serv., 377 F.2d 511 (C.A. 5), cert. denied, 389 U.S. 849, 88 S.Ct. 102, 19 L.Ed.2d 118 (1967); Movible Offshore Co. v. Ousley, 346 F.2d 870 (C.A. 5, 1965). In Dore v. Link Belt Co., 391 F.2d 671 (C.A. 5, 1968), and Rodrigue v. Aetna

Cas. & Sur. Co., 395 F.2d 216 (C.A. 5, 1968), we extended the rationale of *Pure Oil* to death claims so as to make them exclusively cognizable in admiralty under the Death on the High Seas Act. In *Rodrigue* plaintiff's decedent was killed when he fell from a derrick to the floor of the platform, and in *Dore* the worker had fallen to his death when the crane on which he was working toppled onto a barge moored below. The Supreme Court granted certiorari in both cases, consolidated them, and ruled that DOHSA did not apply. The Court then reasoned that since state law governed under § 1333 in the absence of inconsistent federal law, the nonapplicability of DOHSA allowed state law to apply as incorporated federal law. The case was accordingly reversed and remanded for further consideration.

The relevance of the *Rodrigue* decision to our case springs as much from its underlying rationale as from its result. The Court reasoned that under traditional jurisdictional principles maritime law is inapplicable to platform-based accidents,[18] but the more fundamental premise was that Congress did not intend by the Lands Act that these island-platforms be within admiralty's jurisdiction.

> Even if the admiralty law would have applied to the deaths occurring in these cases under traditional principles, the legislative history shows that Congress did not intend that result. First, Congress assumed that the admiralty law would not apply unless Congress made it apply, and then Congress decided

18. The thesis for this argument was that the island-platforms were to be viewed as extensions of the subsoil, and that admiralty jurisdiction traditionally had not attached to extensions of land not erected as navigational aids. 395 U.S. at 359-361, 89 S.Ct. at 1839-1840, 23 L.Ed.2d at 366-367.

> not to make it apply. The legislative history of the Lands Act makes it clear that these structures were to be treated as islands or as federal enclaves within a landlocked State, not as vessels.

395 U.S. at 361, 89 S.Ct. at 1840, 23 L.Ed.2d at 367.[19] One indication of Congress' intent to exclude island-platforms from admiralty jurisdiction was said to be the emphasis in the congressional debates and hearings on the close relationship between adjacent states and platform workers, who often commute regularly between land and platform. 395 U.S. at 363, 89 S.Ct. at 1841, 23 L.Ed.2d at 368. The Court also noted the theme underlying the legislative history that exploration and development of underground resources on the continent's submerged shelf lands was substantively a land-related activity and alien to the traditional interests of maritime law. *Id.* at 364-365, 89 S.Ct. at 1841-1842, 23 L.Ed.2d at 369.[20]

19. At least in methodology this court and the Supreme Court found common ground. In Pure Oil Co. v. Snipes, 293 F.2d 60 (C.A. 5, 1961), we had stated:

> "If [state] law is to apply, it is because Congress has specified that this is so.
>
> . . . . .
>
> [W]e are not confronted with the question whether Congress would have the constitutional power to declare as to these offshore activities that for an essentially maritime matter a non-maritime standard is to be followed. At most, we have a question whether Congress may treat an occurrence in this new geographical area as substantially maritime even though on traditional lines an event taking place on a structure fixed permanently to the bed of the water might be regarded as non-maritime."

Id. at 64.

20. The Court quoted the testimony of an admiralty expert given at the congressional hearings that "[M]aritime law in the strict sense has never had to deal with the resources in the ground beneath the sea, and its whole tenor is ill adapted for that purpose." 395 U.S. at 365 n. 12, 89 S.Ct. at 1842 n. 12, 23 L.Ed.2d at 369 n. 12.

These concerns about the close relationships between platform workers and their adjacent states and about the nonmaritime character of platform operations indicate to us that Congress did not intend that application of state law necessarily should cease at the physical boundaries of the platform. The same concerns may be equally applicable to accidents fortuitously consummated in the surrounding sea. While Monk's death occurred on the high seas, there is little to choose between his relationship to the adjacent state and those of his fellow platform workers. He was by all standards a platform worker. The time he spent aboard the CARRYBACK was primarily in pursuit of such platform-related duties as filling out work reports and communicating with his shoreside office. Also, his claim against C & K and Chapman rests on the theory that they performed the renovation project on the platform in an unreasonably unsafe manner, and, as *Rodrigue* teaches, Congress felt that accidents caused by such operations were more significantly tied to the interests of the adjacent state than to the admiralty's interest in maritime commerce.

Post-*Rodrigue* case law in this circuit supports a view that Congress intended by § 1333 to extend the law of the adjacent state to claims such as the one in issue. Twice we have found maritime law inapplicable to claims by platform workers pushed into surrounding seas by platform-based equipment, even though substantial injuries may have been physically caused by the water itself. See Bible v. Chevron Oil Co., 460 F.2d 1218 (C.A. 5), cert. denied, 409 U.S. 984, 93 S.Ct. 325, 35 L.Ed.2d 248 (1972); Bertrand v. Forest Corp., 441 F.2d 809 (C.A. 5), cert. denied, 404 U.S. 863, 92 S.Ct. 106, 30 L.Ed.2d 107 (1971). In *Rodrigue* itself one of the decedents was

killed when he fell onto a barge moored next to the platform. The distinction between the suitors in these cases and one in the position of Monk, fortuitously positioned at sea at the time of explosion, is at best elusive. We might say that in the earlier post-*Rodrigue* cases a tort originating on the platform cast its victims into the sea, whereas in Monk's case the tort travelled for approximately seventy-five feet across the water to find its victim, but it seems illogical to assume that Congress would have grounded the choice between maritime and state law on a distinction so lacking in substance.

[6-10] Other developments in the law of admiralty jurisdiction point toward treating Monk's claim against the platform defendants as under the law of the adjacent state. Historically maritime jurisdiction has been measured by the locality of the wrong[21] with locality defined as where the "substance and consummation of the injury" took place. The Plymouth, 70 U.S. (3 Wall.) 20, 33, 18 L.Ed. 125, 127 (1886).[22] But as the Supreme Court recently noted in Executive Jet Aviation v. Cleveland, 409 U.S. 249, 261, 93 S.Ct. 493, 501, 34 L.Ed.2d 454, 463 (1972), increasingly there have been legislative and

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21. *See generally* discussions in Watz v. Zapata Off-Shore Co., 431 F.2d 100, 109-111 (C.A. 5, 1970); Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (C.A. 5, 1972); 7A Moore, Federal Practice ¶ .325 [3] (2d ed. 1972); Black, Admiralty Jurisdiction: Critique and Suggestions, 50 Col. L. Rev. 259 (1950).

22. This strict locality test is so mechanical in operation that at times it has made maritime jurisdiction depend on the direction from which plaintiff fell, landward or seaward. *Compare* T. Smith & Son, Inc. v. Taylor, 276 U.S. 179, 48 S.Ct. 228, 72 L.Ed. 520 (1928) [longshoreman knocked from wharf staging into water by sling being lowered from vessel; state law applicable], *with* Minnie v. Port Huron Term. Co., 295 U.S. 647, 55 S.Ct. 884, 79 L.Ed. 1631 (1935) [longshoreman knocked by hoist from vessel onto adjacent wharf; federal law applicable].

judicial rejections of strict locality as the sole test of jurisdiction. A seaman, for example, can recover under the Jones Act for injuries suffered in the course of the ship's services, whether on land or sea. In his case "[a]dmiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters." O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 42-43, 63 S.Ct. 488, 492, 87 L.Ed. 596, 602 (1943). *Accord,* Kelly v. Smith, 485 F.2d 520 (C.A. 5), cert. denied sub nom. Chicot Land Co. v. Kelly, ____U.S.____, 94 S.Ct. 1991, 40 L.Ed.2d 558 (1974); Kimble v. Noble Drilling Corp., 416 F.2d 847 (C.A. 5, 1969), cert. denied, 397 U.S. 918, 90 S.Ct. 924, 25 L.Ed.2d 99 (1970).[23] And in 1948 Congress moved admiralty jurisdiction shoreward with the Extension of Admiralty Act, 46 U.S.C. § 740, which provides that maritime jurisdiction shall include cases of damage "cause by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." This statute applies to give admiralty jurisdiction over pierside injuries caused by the vessel's hull, gear, or cargo. See Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 83 S.Ct. 1185, 10 L.Ed. 2d 297 (1963), explained in Victory Carriers, Inc. v. Law, 404 U.S. 202, 209-210, 92 S.Ct. 418, 423-424, 30 L.Ed.2d 383, 390 (1971).

23. A seaman's right to maintenance and cure is similarly unbounded by locality. Gilmore & Black, Law of Admiralty §§ 6-6 to 6-9 (1957). For suits on a contract, maritime relationship, not locality, has always determined jurisdiction. DeLovio v. Boit, 7 F. Cas. pp. 418, 444 (No. 3,776) (CCD Mass. 1815); Kossick v. United Fruit Co., 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961); Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955).

Several courts have recently declined to uphold admiralty jurisdiction over accidents consummated in state territorial waters but lacking a significant maritime connection. In Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (C.A. 5, 1972), plaintiff, while parked on a floating pontoon waiting to board a ferry, was involved in a rearend collision. He sued in admiralty for resulting whiplash and back injuries. The court rejected strict locality as the sole test of jurisdiction because of its failure "to provide any clear guidance," *id.* at 1126, and focused instead on the connection of the claim to traditional maritime activities or interests. Since maritime connection was lacking in the relationship between the parties, in the nature of the alleged negligence (failure to keep an automobile under control and to maintain a proper lookout), and in the nature of injuries (whiplash), the court dismissed the suit. In *Executive Jet* plaintiff's plane had suffered a power loss from ingesting seagulls into its engines on taking off from defendant's airport and finally had settled into Lake Erie just off the end of the runway, where it sank and became a total loss. Plaintiff sued in admiralty for property damages, alleging that defendant negligently failed to keep its runway free of seagulls or to warn of their presence, but the Court dismissed for lack of jurisdiction.

> [T]he mere fact that the alleged wrong "occurs" or is "located" on or over navigable waters—whatever that means in an aviation context—is not itself sufficient to turn an airplane negligence case into a "maritime tort." It is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity. We hold that unless such a relationship exists, claims arising from air-

> plane accidents are not cognizable in admiralty in the absence of legislation to the contrary.

Id. 409 U.S. at 268, 93 S.Ct. at 504, 34 L.Ed.2d at 467.[24]

[11] The emphasis on maritime connection as a prerequisite to admiralty jurisdiction—typified by the Supreme Court's opinion in *Executive Jet* and by *Peytavin* in this circuit—is an additional reason for holding DOHSA inapplicable to the Monk death claim. Monk was a platform worker. He was aboard the CARRYBACK for the purpose of performing duties directly related to platform operations, the physical cause of his death was the platform explosion, and his cause of action against the platform defendants is based on negligent performance of platform operations. Under the teaching of *Rodrigue* these factors exemplify a more significant connection with the adjacent state than with admiralty.

Re Motor Ship Pacific Carrier, 489 F.2d 152 (C.A. 5, 1974), cert. denied, Union Camp Corp. v. Gypsum Carrier, Inc. ____U.S.____, 94 S.Ct. 2643, 41 L.Ed.2d 235 (1974), is not inconsistent with our conclusion. In that case the tort was the emission from a plant located on the bank of a navigable stream of fumes, smoke and gases which blew across the channel and engulfed a ship under way. The vessel, with visibility lost, collided with a bridge. Emphasizing substantial maritime connections, rejecting a strict locality test, and relying upon *Executive Jet* and our decisions in *Peytavin* and *Kelly*, we held that the ship's

24. Other cases often cited as representing a trend away from the strict locality test are Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 34 S.Ct. 733, 58 L.Ed. 1208 (1914); Watz v. Zapata Off-shore Co., 431 F.2d 100 (C.A. 5, 1970); Chapman v. City of Grosse Pointe Farms, 385 F.2d 962 (C.A. 6, 1967); McGuire v. City of New York, 192 F.Supp. 866 (S.D.N.Y. 1961).

claim against the plant was within admiralty jurisdiction. As in *Kelly*, where the cause of injury was gunfire from shore, the landbased origin of the wrong consummated on the sea did not avoid admiralty jurisdiction. *Pacific Carrier* would be more nearly comparable to the case before us if the claim asserted against the plant had been that of the plant superintendent, aboard the vessel as neither crewman nor as passenger in the usual sense but using the vessel to perform plant-related duties at the time vision was obscured by smoke and fumes created in part by his landbased lack of care.

We conclude that § 1333(a)(2) of the Lands Act, when read against the background of legislative history outlined in *Rodrigue* and the increasing judicial and legislative dissatisfaction with strict locality as the sole test of jurisdiction, precludes us from treating Monk's claim against C & K and Chapman as a suit in admiralty. Accordingly the Texas doctrine of contributory negligence bars recovery by Monk's heirs from C & K and Chapman.[25]

25. *Rodrigue* must be read against the background of §1333(a)(2), the section that extends state law to the artificial islands and that forms the basis of the *Rodrigue* decision. Section 1333(b) is cast in broader terms:

> "The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources . . . ."

An argument could be made that this subsection, read in conjunction with subsection (a)(2), at once prescribes jurisdiction and makes state laws applicable to "cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf." Our interpretation of *Rodrigue* rejects this construction. The premise of *Rodrigue* is that DOHSA does not apply to platform-based injuries, and its nonapplicability opens the door

[12-16] Dearborn has not claimed the benefit of the Texas contributory negligence bar, and correctly so. Suits by landsmen injured aboard ship in navigable waters have traditionally been within maritime jurisdiction. Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959). Moreover, Dearborn's situation is different from that of the platform defendants whose breaches of duty were platform-related, while Dearborn's concurring breaches were admiralty-related. As between platform defendants and Monk, the only nexus with admiralty was Monk's presence aboard the vessel.[26] In this context it is consistent with the rationale of *Rodrigue* and the teachings of *Executive Jet* and *Peytavin* that the surrogate law of the platform controls the controversy. In the context of Monk versus Dearborn, however, the interest of admiralty intervenes because the risks to which Monk was exposed by Dearborn, and Dearborn's breaches thereof, were admiralty-related, concerning the duty of the vessel to those aboard her. Under the former "locality" test for determining admiralty jurisdiction, if Monk were a dock worker who, on like facts and with like consequences, had left the dock and gone aboard the CARRY-

for state laws. The question whether DOHSA applies to injuries occurring on the high seas around the platform, and thus ousts inconsistent state laws, cannot be answered by the "in connection with" test of subsection (b). This much is implicit in Kimble v. Noble Drilling Corp., 416 F.2d 847 (C.A. 5, 1969), cert. denied, 397 U.S. 918, 90 S.Ct. 924, 25 L.Ed.2d 99 (1970), in which we permitted a seaman to sue his employer under the Jones Act for injuries sustained on a stationary platform. His status as seaman, we explained, was sufficient to invoke the jurisdiction of the Jones Act even though his injury was in connection with platform operations.

26. The CARRYBACK's crew members possessed a maritime status and were killed in the performance of distinctively maritime work.

BACK tied up nearby, his claim would have been in admiralty. After *Executive Jet, Peytavin* and *Kelly* the result would be the same, since there would be involved both locality and the relationship to admiralty previously recognized in *Kermarec*. As *Rodrigue* points out, the platform is like a pier. *Rodrigue* did not, by making land law the surrogate law of the platform, give it greater application off the platform in an admiralty-related situation than the land law would have off the pier in like circumstances. The interests vindicated in *Rodrigue* were, first, the status of the platform worker as land-related, and, second, the interest of the state in the process of extracting minerals from the soil and its particular capacity to deal with that subject matter as against admiralty's incapacity. Here there are also present matters which admiralty is particularly adapted to handle and land law is not. Admiralty's jurisdiction over the Monk claim against Dearborn is not ousted.[27]

27. Our analysis has been in jurisdictional terms though the question presented was not whether the District Court had jurisdiction, but whether once having acquired jurisdiction it should apply Texas or maritime law. Choice of law questions raised in a maritime context have traditionally been analyzed in jurisdictional terms, however, because as a general rule "[o]nce admiralty jurisdiction is established, then all of the substantive rules and precepts peculiar to the law of the sea become applicable ." Branch v. Schumann, 445 F.2d 175, 178 (C.A. 5, 1971). *Accord,* Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 628, 79 S.Ct. 406, 408, 3 L.Ed.2d 550, 553 (1959); King v. Alaska S.S. Co., 431 F.2d 994, 996 (C.A. 9, 1970). *But cf.* Watz v. Zapata Off-Shore Co., 431 F.2d 100, 112 (C.A. 5, 1970), explained in 7A Moore, Federal Practice ¶ .325 [1], at 3502 n. 3 (Supp. 1972). In many respects the difference between our framing the inquiry in jurisdictional or choice of law terms is purely semantical. Relationship of the tort to the forum state is fundamental to choice of law analysis, Restatement 2d, Conflict of Laws §§ 6, 145 (1971), and *Executive Jet* has now made clear that the degree of maritime relationship may also influence the jurisdictional issue. Occasionally admiralty borrows state law or uses it for analogies in formulating substantive maritime principles. *See,*

3. Dearborn's liability.

a. Negligence.

[17] The District Court ruled that Dearborn breached a legal duty owing to Monk because its skipper, Armstrong, was negligent in mooring his ship with a seventy-five foot rope to the platform's leeward side, which negligence was causally related to deaths of the crew and of Monk. The District Court found that "[t]he master knew or must, in law, be charged with knowing that the platform was a deteriorated oil storage platform and that welding was being done on the platform, for he carried the equipment for the welding operations to the platform on his boat," and that "Mr. Armstrong, the master, knew or should have known of the hazardous proximity of his boat to potential fires and possible explosion by the fact that he had, at an earlier date, helped to put out a fire on this platform during these repair operations." 340 F. Supp. at 1245. These rulings are adequately supported by the record and are affirmed.

[18] The maritime duty of the shipowner to Monk, that owing to a nonseaman "on board for purposes not inimical to . . . legitimate interests [of the shipowner]," is not one of furnishing a seaworthy hull and appliances without regard to fault, but one of "exercising reasonable care under the circumstances." Kermarec v. Compagnie Generale Transatlantique, *supra;* The Admiral Peoples, 295

e. g., The Tungus v. Skovgaard, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959); Alcoa S.S. Co. v. Charles Ferran & Co., 383 F.2d 46 (C.A. 5, 1967), cert. denied, 393 U.S. 836, 89 S.Ct. 111, 21 L.Ed.2d 107 (1968); Wilburn Boat Co. v. Fireman's Fund Ins. Co,. 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955); S.S. Philippine Jose Abad Santos v. Bannister, 335 F.2d 595 (C.A. 5, 1964).

U.S. 649, 55 S.Ct. 885, 79 L.Ed. 1633 (1935); Leathers v. Blessing, 105 U.S. 626, 26 L.Ed. 1192 (1882).

As the District Court noted, the CARRYBACK's master had transported the welding machines to the platform, so he knew that hot work was being conducted around the tanks. Ray, the DEI supervisor prior to Monk's assumption of duties, testified that Armstrong knew of the presence of oil in the tanks and that he knew an oil-soaked board had caught fire a few days before the May 28 explosion. Also, in response to the question, "Did you at any time tell Captain Armstrong, where you got your boat tied up on a short tether, 'You've got a tank up there with hundreds of barrels of oil in it right above your head,' " Ray answered, "Yes, sir." The master, rather than taking steps to avoid the risk of possible fire or explosion, enhanced it by mooring his boat in such a position that the prevailing winds would tend to carry any ensuing flames over his vessel,[28] subjecting those aboard to risk of death or injury in the event an explosion or a fire occurred. Additionally, there was testimony that part of the CARRYBACK's function was to evacuate people from the platform in the event of emergency and that a vessel performing such function customarily held off sufficiently from the platform that she would not expose herself to the same danger from which she might be called on to save others.[29]

28. At the time of year the prevailing winds were generally from the southeast.

29. Dearborn's managing officer was familiar with the Manual for Offshore Operations, published November 23, 1967 by the Offshore Operators Committee. While the Manual does not specifically refer to unmanned collection and storage platforms on which work is taking place, it suggests that drilling units be attended by a standby vessel to assist personnel in the event of an emergency. *Id.* § VIII(1).

There was evidence that there were alternatives to tying up on a short line downwind of the platform when the vessel was not engaged in unloading or taking on men. The testimony showed that the CARRYBACK could have dropped a mooring buoy several hundred feet upwind and tied up to it, or could have tied up to the platform, as she did, but with a rope long enough to take her out of the shadows of the oil filled tanks.

Dearborn's reliance upon the "safe berth" cases[30] as exonerating the CARRYBACK is misplaced. This argument is *sub silentio* an attack on the finding that the master was negligent in mooring where he did. The "safe berth" cases relate to the duty of a wharfinger (or another who invites or directs a vessel to use his berth or dock) to use reasonable diligence to avoid damage to the vessel. They do not exonerate the master from his own duty to moor the vessel in a safe location. Joe Eddie Dyer, the officer of Dearborn who handled arrangements with DEI for the use of the vessel, testified:

> Q. Now, would it be true that Captain Armstrong was in command of the vessel "CARRYBACK" at all times?
>
> A. Yes.
>
> Q. And is it true that under your working arrangement, that Captain Armstrong would have had ultimate authority to have prevented that vessel from being moored or docked at any point that he felt was dangerous?
>
> A. Yes.
>
> Q. You did not—the captain, in his command, did not release any of his authority over the safety of the vessel to anyone else, any client or anyone else, did he?
>
> A. No.
>
> Q. Is it true that the primary responsibility of the master of a vessel is to first look to the safety of the vessel and its crew?
>
> A. Yes.
>
> Q. So as to maintain it operable at all cost?
>
> A. Yes, sir.

The managing officer acknowledged that CARRYBACK was serving as a standby vessel for the C & K platform. The Manual also states that the "prime purpose of the attending vessel [is] to save endangered lives if a possibility exists to save them." *Id.* § VIII(4). Some of the workers from this platform perished in the sea.

30. *E. g.,* Smith v. Burnett, 173 U.S. 430, 19 S.Ct. 442, 43 L.Ed. 756 (1899); Campbell v. Wetherill, 130 F. 213 (E.D. Pa. 1904); Look v. Portsmouth, K & Y St. Ry., 141 F. 182 (D. Me. 1905); Canton Co. v. Brown, 299 F. 147 (C.A. 4, 1924).

Dearborn is also wide of the mark with its argument that while some risk of explosion might have been foreseeable, no reasonable man could expect Monk and the Chapman personnel to weld a line leading directly into the oil-filled tanks.

> Foreseeability does not mean that the precise hazard or the exact consequences which were encountered should have been foreseen. Upon this all are agreed. . . . "[W]hen it is found that a man ought to have foreseen in a general way consequences of a certain kind, it will not avail him to say that he could not foresee the precise course of the full extent of the consequences, being of that kind, which in fact happened."

Harper & James, Law of Torts § 20.05, at 1147 (1956), quoting Pollock, Liability for Consequences, 38 L.Q.Rev. 165, 167 (1922). *Accord,* Restatement 2d, Torts § 435. In this case the precise occurrence was well within the zone of the risk that hot work on the platform would trigger an explosion.

[19] We also reject Dearborn's contention that the CARRYBACK, by being moored too close to the platform, merely created a condition on which intervening negligent forces of others acted and was not itself a proximate cause of the deaths in issue. This theory of proximate causation, now almost universally rejected, in admiralty as elsewhere, is an argument "grow[ing] out of the discredited notion that only the last wrongful act can be a cause—a notion as faulty in logic as it is wanting in fairness." In re Kinsman Transit Co., 338 F.2d 708, 719 (C.A. 2, 1964), cert. denied sub nom. Continental Grain Co. v. City of Buffalo, 380 U.S. 944, 85 S.Ct. 1026, 13 L.Ed.2d 963 (1965). The correct rule is that actionable negligence may consist of failure to take precautions against foreseeable acts of third persons, and this rule applies though the conduct of the third person is itself negligent. Restatement 2d, Torts §§ 302, 302A; Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge, 424 F.2d 684, 689 (C.A. 5), cert. denied sub nom. Ocean Drilling & Exp. Co. v. Signal Oil & Gas Co., 400 U.S. 832, 91 S.Ct. 65, 27 L.Ed.2d 64 (1970); Horton & Horton, Inc. v. T/S J. E. Dyer, 428 F.2d 1131 (C.A. 5, 1970), cert. denied, 400 U.S. 993, 91 S.Ct. 461, 27 L. Ed.2d 441 (1971); Harper & James, Law of Torts § 20.-05, at 1144 n. 34 (1956). *See also* Restatement 2d, Torts § 449.

The conclusion that Dearborn was negligent must be affirmed. Dearborn urges that if the manning and inspection requirements discussed in part b, immediately following, are inapplicable to the CARRYBACK, its only remaining negligence is that attributable to it from Captain Armstrong's own actions in mooring too close to the platform, and in that event, Dearborn asserts, the Armstrong

claimants cannot recover against Dearborn on negligence grounds. This contention is for the District Court on remand.

b. Unseaworthiness.

We are unable to affirm the finding that CARRYBACK was unseaworthy. The District Court's conclusions that the vessel violated manning and inspection requirements imposed by statute(s) and regulations are central to the unseaworthiness question, and (as noted in the last sentence of part a, just above) also relate to the question of Dearborn's negligence. For reasons which follow, that issue must be reconsidered by the District Court. Additionally the unseaworthiness issue spills over to the question of limitation of liability, part 9, *infra*.

As we construe the opinion of the District Court, the CARRYBACK was found unseaworthy for at least three partially overlapping reasons: (1) She did not have a competent crew. This includes subsidiary findings that she did not have a licensed pilot required for passenger-carrying vessels as referred to in 46 U.S.C. § 404 and that Captain Armstrong was not a licensed master. Possibly it also includes a finding that independently of failure to comply with a licensing requirement Armstrong was an incompetent master, because he lacked knowledge of where the vessel should be moored in relation to the platform and because he moored close to the platform with actual knowledge that small fires already had occurred on the platform and knowledge (actual or chargeable) of the welding being done on the platform.[31]

31. And, though the court does not mention it at this point in its opinion, with actual knowledge, according to Roy's testimony, that there was oil in the tanks.

(2) The vessel did not have a certificate of inspection. (3) There was a "congeries" of conditions creating unseaworthiness,[32] including: (a) the method of mooring the boat under the circumstances of the obviously deteriorated state of the platform; (b) placing in charge a master who did not have the competence to know to moor farther out from the platform or to request or recommend a mooring buoy that would permit such safer mooring; (c) failure to be equipped with a mooring buoy.

We turn first to the manning and inspection requirements. The physical dimensions of the CARRYBACK, 85 feet in length and 136 gross tons, were within the language of 46 U.S.C. § 404, but Dearborn insists this section has no application to her because she was not a vessel "carrying passengers for hire" within the meaning of that section. The section provides in pertinent part:

> The hulls and boilers of every ferryboat, canal boat, yacht or other small craft of like character propelled by steam, shall be inspected under the provisions of this title. Such other provisions of law for the better security of life as may be applicable to such vessels shall, by the regulations of the Secretary of the department in which the Coast Guard is operating, also be required to be complied with before a certificate of inspection shall be granted, and no such vessel shall be navigated without a licensed engineer and a licensed pilot: *Provided,* That in open steam launches of ten gross tons and under one person, if duly qualified, may serve in the double capacity of pilot and engineer. All vessels of above fifteen gross tons carrying freight for hire and *all vessels of above fifteen gross tons and in excess of*

32. Citing Robinson v. Showa Kaiun K.K., 451 F.2d 688 (C.A. 5, 1971).

> *sixty-five feet in length carrying passengers for hire,* but not engaged in fishing as a regular business, propelled by gas, fluid, naphtha, or electric motors,*shall be subject to all the provisions of this section* relating to the inspection of hulls and boilers and *requiring engineers and pilots,* and for any violation of the provisions of title 52 of the Revised Statutes applicable to such vessels, or of rules or regulations lawfully established thereunder, and to the extent to which such provisions of law and regulations are so applicable, the said vessels, their masters, officers, and owners shall be subject to the provisions of sections 494-498 of this title, relating to the imposition and enforcement of penalties and the enforcement of law. (emphasis added)

[20] At trial Dearborn attempted unsuccessfully to develop a theory that it had made a bareboat charter of the boat to DEI which was engaged in transporting only its own employees. 46 U.S.C. § 390(a) defines "passenger" as "every person carried on board a passenger-carrying vessel," with certain exceptions. Sub-part (4) thereof excepts "any employee of the bareboat charterer." Dearborn reasoned that since there were no "passengers" carried, the vessel dropped out of the scope of § 404. See United States v. The Reefer King, 90 F. Supp. 236 (W. D. Wash. 1950). This point has been abandoned on appeal, and wisely so.[33] But Dearborn claims that regard-

33. There was a total failure of proof that a bareboat charter was made. Dearborn's officer who handled the arrangements with DEI was firm in his testimony that a bareboat charter was not intended, that the arrangement by which Dearborn's boat, crew and master carried out the functions which we have described (for $350 per day plus consumables) was a temporary one until a bareboat charter could be worked out at a future time, and that the charter was never worked out. With no substantial factual predicate, Dearborn attempted at trial to bring itself within what witnesses described as standard practice employed by firms supplying boats and services

less of how the arrangement between it and DEI is characterized—whether as bareboat charter, time charter, or a contract to furnish services pursuant to which Dearborn undertook to transport passengers out to the platform and back[34]—§ 404 applies exclusively to what Dearborn terms "public conveyances" of passengers. While Dearborn nowhere sets out what it contends "public conveyances" includes, it urges that the term excludes an arrangement made by special contract between private parties for transportation of employees of a non-owner party, the very arrangement which it claims existed between it and DEI. We find the argument unpersuasive. First, to accept it would knock a giant hole in the regulatory scheme. Section 404 contains no such limitation. It does not state or suggest that Congress intended to exempt

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to the offshore oil industry in the Gulf, pursuant to which the supplier enters into two agreements, a bareboat charter of the vessel and a separate operating agreement (at times made by another legal entity) under which a crew is supplied. This is the "thin weight of paperwork" to which the District Judge referred as a device to avoid the safety requirements of § 404. 340 F.Supp. at 1243. But in this case no such arrangement was made. The trial judge's reference to "dummy corporations" arose from the fact that there were several corporations in the "Dearborn group" that were subsidiaries of a common parent and sharing the same officers, directors and quarters, and, that as part of its "bareboat charter" effort, Dearborn sought to spin out a theory that the boat was chartered by one subsidiary and the crew furnished by another. This effort foundered along with the "bareboat charter" theory, and in the end Dearborn conceded that the several corporations were in effect a single entity.

With the case in this posture we need not rule on the effect *vel non* that an arm's length bareboat charter will have upon the safety requirements of 46 U.S.C. § 404. Compare 46 U.S.C. § 497 and the language of § 404 referring to §§ 494-498. Nor do we need to rule on the District Judge's statements concerning "paperwork" arrangements carried out through dummy corporations for the purpose of evading § 404.

34. The latter appears to be the characterization intended by District Judge Singleton in the decision below.

private arrangements like the one between Dearborn and DEI. Moreover, Coast Guard regulations define "carrying passengers for hire" as "[t]he carriage of any person or persons by a vessel for a valuable consideration, whether directly or indirectly flowing to the owner, charterer, operator, agent or any other person interested in the vessel." 46 CFR § 70.10—3. This interpretation, made by the enforcing agency and hence highly probative of the statute's true meaning, clearly negates the existence of the claimed exemption.

In The Jacob G. Neafie, 8 Ben. 251, 13 Fed. Cas. p. 266, No. 7,156 (E. D. N. Y. 1875), a statutory penalty was sought against a steam tugboat navigating in New York harbor which had transported passengers without the certificate of inspection required of "every steam vessel carrying passengers" by then R. S. § 4417, now 46 U.S.C. § 391. The sufficiency of the libel was questioned on the ground the vessel was a tugboat not engaged in regular service as a carrier of passengers. To this the court responded:

> The libel does, however, show that the vessel proceeded against on the 28th of November, 1874, received on board and carried passengers in the harbor and bay of New York, and it may fairly enough be considered to aver that on that day she was employed in the service of carrying passengers for fares as part of her business for that day. So understood, the libel is sufficient. The intention of the act is to compel every steam vessel, before engaging in the service of carrying passengers, to be inspected, with a view of ascertaining whether she may be used to transport passengers with safety to life. The necessity for inspecting exists, as well where the vessel engages in the business of carrying passengers for

> a single occasion and outside of her regular business, as when her daily occupation is the carrying of passengers; and such a vessel should be held to be a vessel employed in the service of carrying passengers, within the meaning of section 4417. My conclusion, therefore, is, that the libel sufficiently states an offense, and that the exceptions must be overruled, with liberty to answer within one week.

13 Fed. Cas. at 267.

Second, the statutory history, a long and tortuous one, does not support the public conveyance-private contract distinction asserted by Dearborn. Section 404 derives from R. S. § 4426 and from an 1871 Act, 16 Stat. 456, requiring ferryboats, canal boats, yachts, or other small craft of like character propelled by steam, to have a certificate of inspection, and forbidding navigation without a licensed engineer and a licensed pilot. In 1896 Congress undertook to amend R. S. § 4426 to subject to regulation and inspection vessels generally referred to as launches or "naphtha launches" of over fifteen tons and carrying passengers or freight for hire.[35] There were two Congressional references to "ferry boats" as examples of vessels carrying passengers for hire,[36] but the major area of concern appeared to be differentiation between the vessels to be covered and vessels used for pleasure.[37] The proposed legislation was enacted in 1897, extending the § 4426 requirements of inspection and of pilots and engineers to "vessels of above fifteen tons burden, carrying freight or passengers for hire, propelled by gas, fluid,

35. See 28 Cong. Rec. 784, Jan. 20, 1896.

36. 28 Cong. Rec. 3915, Apr. 13, 1896; 28 Cong. Rec. 4846, May 5, 1896.

37. 28 Cong. Rec. 4846, *supra*.

naphtha, or electric motors."[38] Additionally, the bill brought the newly covered vessels within the rules of the road. It would make little sense that vessels classified by size and method of propulsion and carrying passengers for compensation should be subject to the rules of the road if they were "public conveyances" but not subject if performing the same function by some private arrangement.

In 1905 Congress reenacted the 1897 provision for boats fifteen tons and over and added a penalty clause.[39] In 1906 an exclusion was added to § 4426 for fishing vessels.[40] If, as Dearborn contends, "vessels carrying passengers for hire" refers only to "public conveyances," it would not have been necessary to create a special exclusion for fishing vessels, which do not normally serve as "public conveyances."

The meaning of "passengers for hire" in § 404 is pointed up further by the Act of May 10, 1956.[41] By that Act Congress enacted what is now §§ 390—390g and amended § 404. The legislative background discloses a Congressional intent to require inspection and certification of certain small vessels carrying passengers and not theretofore covered by federal safety requirements. Several casualties, in which numerous passengers lost their lives aboard "small mechanically propelled passenger-carrying

38. Act of Jan. 18, 1897, 29 Stat. 489.

39. This was necessitated by a federal decision that while the 1897 legislation subjected vessels to inspection and the necessity for licensed officers it permitted no punishment of boats or masters for violations. See Annotation to 46 U.S.C.A. § 404.

40. See Annotation to 46 U.S.C.A. § 404; Act of May 16, 1906, 34 Stat. 193.

41. 70 Stat. 153.

vessels for hire," see 1956 U.S. Code Cong. & Admin. News, pp. 2527, 2528, focused the legislators' attention on a gap in the regulatory scheme. The vessels on which the accidents occurred fell between § 404 (covering vessels of more than fifteen gross tons carrying [freight or] passengers for hire) and the Federal Motor Boat Act of 1940, 46 U.S.C. § 526 et seq. (since repealed in part) (covering pleasure craft). *Id.* at 2527. To fill this gap came the 1956 Act, providing in § § 1—10, codified as 46 U.S.C. §§ 390—390g, for inspection and certification of smaller passenger-carrying vessels. In no respect does the coverage of this broadened statutory system appear to be limited by the status of the vessel as a "common carrier" or "public conveyance." Rather, a line is drawn in terms of the status of the passenger, that is, whether he has or has not contributed consideration for his carriage. Sec. 1 of the Act, 46 U.S.C. § 390, defines passengers as all persons aboard a passenger-carrying vessel and then except from this catagory crew members who are paid for their services and have "contributed no consideration for their carriage" [sub-part (a)(2)]. It also excepts a guest aboard a pleasure vessel "who has not contributed any consideration directly or indirectly, for his carriage" [sub-part (a)(5)]. The payment or lack of payment of consideration, direct or indirect, is the same distinction employed in the Coast Guard Regulation, 46 CFR 70.10—3. Sub-part (6) of Subsec. 1(a) of the Act, 46 U.S.C. § 390(a)(6), was added to exempt tugboats and towboats occasionally carrying more than six nonpaying guests for harbor and dock inspection trips. See 1956 U.S. Code Cong. & Admin. News p. 2530. No such exemption would have been necessary if the Act were to be limited to "public conveyances" of passengers, a category

that hardly includes tugboats and towboats. It appears to have been intended that the new inspection and certification procedures under §§ 390—390g and those already existent under § 404 should together form an integrated regulatory scheme for small passenger-carrying vessels not under the Motorboat Act of 1940. It would be anomalous indeed if vessels falling under § 404 are limited to those serving as "public conveyances" while the smaller vessels under § 390 are not so limited.

The linking together of §§ 390—390g and § 404 is further demonstrated by the fact that sub-part 6(a) of the 1956 Act (which amended § 404) expressly dropped from coverage under § 404 certain small vessels—those over fifteen tons but sixty-five feet or less in length—in order that they could be included in § 390 coverage. See 1956 U. S. Code Cong. & Admin. News p. 2530. Additionally, the sections are linked by the provisions in § 390 that its definitions are applicable to § 404 unless the context requires otherwise.

The only authority offered by Dearborn in support of its theory of the meaning in § 404 of "carrying passengers for hire" is language from Carlsen v. Paladini, 5 F.2d 387 (CA9 1925). The vessel in that case was a motorboat used to perform a contract to transport materials, supplies and equipment for a construction company. Employees of the construction company sought and obtained a free ride, and were hurt when steel cables linking the THREE SISTERS to a barge she was towing parted. The owner sought limitation of liability, and the injured persons opposed it on the ground the THREE SISTERS was carrying passengers without a certificate of inspection. The court held that the THREE SISTERS was not a pas-

senger carrying vessel, giving several reasons. Neither the employer of the riders nor the riders paid any fare or the equivalent or had a contract for such payment; the owner had no contract with the employer to transport passengers; the boat was not a public conveyance, did not hold itself out as a common carrier, and her business was towing upon occasional engagements. These references to "common carrier" and "public conveyance" in the recital of reasons why the vessel was not a passenger carrying vessel are not authority that § 404 is limited to "common carriers" or "public conveyances." Dearborn's argument that the CARRYBACK was not within § 404 because, though fifteen miles from shore, between a trip out and a trip back, it was tied up at the moment of explosion and hence not being "navigated", is frivolous. United States v. Monstad, 134 F.2d 986 (CA9 1943); Carr v. Hermosa Amusement Corp., 137 F.2d 983 (CA9 1943), cert. denied, 321 U.S. 764, 64 S.Ct. 520, 88 L.Ed. 1060 (1944).

[21] Summarizing, we reject Dearborn's theory that the CARRYBACK was not subject to § 404 because that section is limited to "public conveyances" of passengers, which does not include an arrangement by special contract between private parties to transport employees of the non-owner party, and we conclude that CARRYBACK was a vessel "carrying passengers for hire" as that term is used in § 404. Beyond that point we are unwilling to go. Without indicating any view on a decision one way or the other, we simply say that on what is before us we are unable to determine with any sense of assurance the extent, if any, to which manning and certification requirements apply to a vessel "carrying passengers for

hire" as that term is employed in § 404.[42] The briefs give us little assistance. The District Court refers in most instances to the lack of a licensed master. Section 404 refers to a licensed pilot. The parties shift indiscriminately from one term to the other. Dearborn asserts, without citation of authority, that § 404 has no application in offshore waters, and that the licensing agency, the Coast Guard, does not require licensed pilots or certificates of inspection on small boats such as the CARRYBACK transporting passengers and material to offshore oil platforms. It makes a policy argument, without supporting evidence, that the offshore boat industry servicing offshore platforms in the Gulf operates without licensed pilots (and/or masters?) and will be thrown into chaos by judicial imposition of licensing and inspection rules not provided for by law or required in practice.

We will not embark "without a pilot, rudder, compass or radar—on an amateur's voyage on the fog-enshrouded sea"[43] of the manning and inspection statutes.[44] Ultimately the voyage may be short and uneventful, but that is not apparent to us.

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42. For starters, see 46 U.S.C. §§ 404(a), 372, 375, 390, 390a-390d, 391, 392, 400, 402, 414, 416, 435, 436, 451-453, 460-462, 463a, 472, 491, 497, and 46 C.F.R. Subchapter H.

43. Frank J., concurring in United States v. Flores-Rodriguez, 237 F.2d 405, 412 (C.A. 2, 1956).

44. There are other questions lurking in the wings. Is there evidence of any lack of qualification by Armstrong, other than his improperly mooring the boat, and can improper mooring by a crew member not shown to be otherwise incompetent constitute unseaworthiness? To constitute unseaworthiness based upon an incompetent crew, was Dearborn required to have, and did it have, knowledge of Armstrong's incompetency? If CARRYBACK was not unseaworthy and Armstrong's only viable claim against Dearborn is in negligence, is the only negligence of Dearborn that imputed from Armstrong or is there an additional periphery of Dearborn negligence?

Because the violations of the manning and inspection requirements were included in the conditions creating unseaworthiness on a "congeries" theory, it may be necessary for the District Court to reconsider its findings on that theory. Whether the "congeries" approach is correctly applicable we decline to decide at this time.

4. Chapman's liability.

Chapman was found liable under the doctrine of respondeat superior for the negligence of Scanlan, one of its pushers. As the District Court reconstructed the events, Monk had instructed Scanlan to remove a valve from the equalizer line. Scanlan's workmen were unable to remove it with wrenches, so Overly, Chapman's jobsite superintendent, instructed them to cut it out with a pipecutter, which they did. Scanlan then told Monk that he was going to weld the line, now in two pieces. Though Monk assumed that the pipe was to be removed from the tank and carried to the side to be welded, Scanlan directed Gaspard to weld it in place. The District Court concluded that Scanlan was negligent in failing to check for the presence of oil in the tanks and in failing to inquire of Monk in greater detail about the desirability of welding the line in place, and Chapman does not contest this conclusion. The question on which the parties have joined issue is whether at the time of the explosion Scanlan was Chapman's employee or whether he was exclusively DEI's borrowed employee. *See generally* Restatement 2d, Agency §§ 219, 220 (1958). At stake is Chapman's liability to the captain and crew members of the CARRYBACK, which the litigants treat as governed by federal

law.[45] Nevertheless, all parties rely on both Texas and federal cases, and we find the former helpful by analogy. The result is the same under either body of law.

[22-27] Without doubt the platform workers were Chapman's general employees. It carried them on its payroll, withheld their income taxes and contributions to F.I.C.A., and carried workmen's compensation and liability insurance. Under Texas law, however, the negligence of such general employees is not to be imputed to the general employer if for a specific job the employee has relinquished to another temporary employer exclusive control over the employee. T. G. & M. Drilling Co. v. Kersh, 295 S.W.2d 466 (Tex. Civ. App. 1956, no writ); Magnolia Pet. Co. v. Francis, 169 S.W.2d 286 (Tex. Civ. App. 1943, writ ref'd), and the same is true under federal law, Standard Oil Co. v. Anderson, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480 (1909). The burden is on Chapman as the putative employer to show that Scanlan was not its employee. The original employment relationship is presumed to continue unless the temporary employer's control over the worker is so pervasive as to be inconsistent with that presumption. *See* Kiff v. Travelers Ins. Co., 402 F.2d 129 (C.A. 5, 1968); Producers Chem. Co. v. McKay, 366 S.W.2d 220 (Tex. 1963); Restate-

45. We have already held in part 2, *supra*, that any liability of Chapman to Monk's heirs is barred by Monk's contributory negligence under the applicable Texas law. Chapman makes no claim that its liability for the death of Captain Armstrong, who was found guilty of contributory fault, must be determined under Texas law. The two crewmen on the CARRYBACK were guilty of no contributory fault. Chapman does not raise as an issue on appeal the correctness of the ruling that it, C & K, DEI and Dearborn were liable for the property damage to the CARRYBACK diminished under admiralty principles by Dearborn's percentage of comparative fault.

ment 2d, Agency § 227, comment b. Factors helpful in deciding whether a new employment relationship has replaced the old are the extent of the temporary employer's control over details of work, his furnishing of the necessary tools, his right to discharge the employees, and his obligations for payment. *See* Ruiz v. Shell Oil Co., 413 F.2d 310 (C.A. 5, 1969); Restatement 2d, Agency § 220. Agreements among the parties assigning the responsibility for supervising the worker are additional guides. *Compare* Magnolia Pet. Co. v. Francis, *supra*. Also, liability under respondeat superior has generally been imposed on the putative employer who has represented his worker as possessed of a certain skill if actionable negligence has occurred in the exercise of that skill.[46]

[28] The evidence amply supports the District Court's conclusion that Chapman did not cede to DEI sufficient control of its employees to relieve it of responsibility for their torts. The oral understanding between the parties was that Chapman would provide equipment and a skilled crew of welders, pipefitters, and sandblasters who would be supervised by Chapman personnel—Chapman's crew superintendant (Overly), and three Chapman pushers, one of whom was Scanlan. Williams, president of DEI, testified that "we wanted some people that were skilled craftsmen that could—that had the practical knowledge of how to hook lines up and follow through with the job." Monk, DEI's engineer, generally supervised all platform work, but responsibility for directing details of

46. *Compare* Standard Oil Co. v. Anderson, 212 U.S. 215, 29 S.Ct. 252, 53 L.Ed. 480 (1909); Producers Chem. Co. v. McKay, 366 S.W.2d 220 (Tex. 1963); Dugas v. Pelican Constr. Co., 481 F.2d 773 (C.A. 5, 1973); Herndon v. Halliburton Oil Well Cementing Co., 154 S.W.2d 163 (Tex. Civ. App. 1941, writ ref'd w.o.m.), *with* Hilgenberg v. Elam, 145 Tex. 437, 198 S.W.2d 94 (1946).

the welding and pipefitting was with Overly and the Chapman pushers. Monk was "there to show them the direction of the whole job, but not to sit there and show every man on that platform exactly what to do." Most importantly, the negligence of Scanlan imputed to Chapman occurred in the operational phase of the work. Monk had directed that a valve be removed, but Overly and Scanlan worked out the specific manner of removal and the subsequent welding. Thus Scanlan's negligence was in conducting a phase of the operation which Chapman had represented its workers competent to perform and over which Chapman personnel had retained a measure of control.

A case close in point is Producers Chem. Co. v. McKay, *supra*. Producers furnished an air compressor and an operator (McDonald) to Canadian River, a drilling contractor, for use in an air drilling project. Sears of Canadian River was responsible for telling McDonald where to connect his compressor and for instructing him when to start it, but McDonald remained responsible for its actual operation. While running the compressor McDonald negligently permitted compressed air and oil to mix in dangerous quantities, and an explosion occurred. The Texas Supreme Court, through Chief Justice Calvert, held that Producers was liable under respondeat superior for McDonald's negligence in operating the compressor. *See also* Aluminum Co. of America (ALCOA) v. Commercial Contracting Co., 438 S.W.2d 853 (Tex. Civ. App. 1969, no writ); Herndon v. Halliburton Oil Well Cementing Co., 154 S.W.2d 163 (Tex. Civ. App. 1941, writ ref'd w.o.m.). Federal cases of similar import are Standard Oil Co. v. Anderson, *supra*, in which a shipowner was held liable for its winchman's negligence in

helping a stevedore to unload a vessel, and Dugas v. Pelican Constr. Co., 481 F.2d 773 (C.A. 5, 1973), in which this court held that a drilling contractor was not the borrowed employer of a roustabout furnished by a labor contractor.

[29] As an independent ground for imposing liability on Chapman, the District Court found that its vice-president, Rick Chapman, negligently failed to warn his employees of the presence of oil in the tanks. Chapman denies that Rick Chapman knew of the oil, but the District Court found as a fact on adequate supporting evidence that Ray, a DEI engineer, warned Rick Chapman of the oil just four days before the explosion and told him, among other things, that working on the platform was like working on a bomb. Chapman's argument that Rick Chapman had no authority to warn his men, whom he knew would be welding around oil-filled tanks, disregards the District Court's conclusion, based on adequate evidence, that the exercise of reasonable care demanded no less.

We affirm the finding that Chapman was liable for negligence.

5. The Armstrong claim.

C & K, Chapman, DEI and Dearborn were held liable for the death of Captain Armstrong with 25% contributory fault. C & K and DEI have not contested their liability. Chapman has raised only the question of its negligence, and we affirm on that issue.

6. Love and Cassel.

C & K and DEI do not dispute their liability for the death of crewmen Love and Cassel. We have affirmed

findings that Chapman was negligent and that Dearborn was negligent, although the extent of Dearborn's negligence is uncertain, and we have directed the District Court to reconsider unseaworthiness.

7. Property damage.

Only Dearborn has appealed from the District Court's rulings on damage to the CARRYBACK. It argues that the conduct of its employee, Armstrong, did not contribute to the destruction of the vessel, and that therefore its recovery from C & K, DEI and Chapman should not have been reduced by 25%. Our discussion in part 3a *supra* disposes of this point.

8. Indemnity.

At issue is distribution among C & K, DEI, Chapman and Dearborn of damages awarded three categories of claimants: (a) Love and Cassel, crew members aboard the CARRYBACK; (b) Armstrong, the master; and (c) Monk.

a. Love and Cassel.

Damages to the estates of Love and Cassel were divided equally among C & K, DEI, Chapman, and Dearborn.[47] Under the judgment each party was made liable for one-fourth of the award. Dearborn contends that it should have been awarded full indemnity from either C & K, DEI, or Chapman even though there was no contract of indemnity between Dearborn and any one of them.

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47. The District Court awarded C & K indemnity from DEI on the basis of a contractual provision. 340 F.Supp. at 1239. This award has not been appealed.

[30] Damages are sometimes shifted from one tortfeasor to another under the tort indemnity rule of Tri-State Oil Tool Indus., Inc. v. Delta Marine Drilling Co., 410 F.2d 178 (C.A. 5, 1969), which entitled a tortfeasor guilty of only "technical or passive" negligence to indemnity from a co-tortfeasor guilty of "active or affirmative" negligence.[48] It is unavailing to Dearborn, however, because the conduct on which its liability is based—i.e., improper mooring of the CARRYBACK—is not sufficiently different in kind or degree to be distinguished from the conduct of the other tortfeasors. They were all guilty of what may fairly be described as "active" misconduct.

[31] The other theory of indemnity advanced by Dearborn derives from Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956), in which a shipowner found liable to a longshoreman under the doctrine of unseaworthiness was allowed indemnity from the stevedore for breach of its warranty of workmanlike performance. Though the Supreme Court stressed the award was based on the "essence of the stevedoring contract," *id.* at 133, 76 S.Ct. at 237, 100 L.Ed. at 142, we have extended it to the shipowner-ship repairer relationship, Lusich v. Bloomfield S.S. Co., 355 F.2d 770 (C.A. 5, 1966), and to a drilling barge owner-independent drill pipe contractor relationship, Whisenant v. Brewster-Bartle Offshore Co., 446 F.2d 394 (C.A. 5, 1971). In each of these cases a vessel owner entrusted control of his vessel to a contractor whose negligent acts made the owner liable for breach of his nondelegable duty to furnish seaworthy appliances. That kind

48. *See generally* Hodges, Contribution and Indemnity Among Tortfeasors, 26 Tex. L. Rev. 151, 153-157 (1947); 41 Am. Jur. 2d, Indemnity §§ 19-27 (1968).

of relationship is lacking between Dearborn and the platform defendants, and indemnity is accordingly unavailable in light of this court's persistent admonitions not "to extend [*Ryan-type* indemnity] beyond those controversies involving the 'special rules governing the obligations and liability of shipowners' which necessitated its formulation and justify its application." Ocean Drilling & Exp. Co. v. Berry Bros. Oilfield Serv., Inc., 377 F.2d 511, 513 (C.A. 5), cert. denied, 389 U.S. 849, 88 S.Ct. 102, 19 L.Ed.2d 118 (1967). *Accord,* Smith Pet. Serv., Inc. v. Monsanto Chem. Co., 420 F.2d 1103, 1109-1111 (C.A. 5, 1970); Delta Engineering Corp. v. Scott, 322 F.2d 11 (C.A. 5, 1963), cert. denied, 377 U.S. 905, 84 S.Ct. 1164, 12 L.Ed.2d 176 (1964); Halliburton Co. v. Norton Drilling Co., 302 F.2d 431 (C.A. 5, 1962), cert. denied, 374 U.S. 829, 83 S.Ct. 1870, 10 L.Ed.2d 1052 (1963); Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge, 424 F.2d 684, 693 (C.A. 5), cert. denied sub nom. Ocean Drilling & Exp. Co. v. Signal Oil & Gas Co., 400 U.S. 832, 91 S.Ct. 65, 27 L.Ed.2d 64 (1970). Loffland Bros. Co. v. Roberts, 386 F.2d 540, 549 (C.A. 5, 1967), cert. denied, 389 U.S. 1040, 88 S.Ct. 778, 19 L.Ed.2d 830 (1968).

b. Armstrong.

The District Court ordered C & K, Chapman, and DEI to join in indemnifying Dearborn for the share of the Armstrong award that it was required to pay. In view of the questions relating to Armstrong's right to recover from Dearborn and the basis thereof, the award of indemnity to Dearborn should be reconsidered.

c. Monk.

The District Court shifted C & K's share of Monk's damages to Dearborn under a complex theory. Since C & K is relieved of liability to Monk, we need not review this point.

9. Limitation of liability.

The District Court judgment denied limitation of liability to Dearborn but without entering findings on privity or knowledge. On appeal the parties adverse to Dearborn on this issue focus upon the alleged failure to comply with the manning and inspection requirements discussed in section 3b, *supra*. Our disposition of that issue requires that the District Court reconsider the limitation question.[49]

10. Damages on the Monk claim.

[32] The court included in the damages to the Monk claimants a specific award of $25,000 for his pain and suffering. Assuming but without deciding that damages for pain and suffering were recoverable[50] the evidence is not sufficient to sustain an award. There was evidence that approximately fifteen minutes before the explosion Monk was within the interior of the vessel, and no one saw him

49. Dearborn's contention that CARRYBACK was not a seagoing vessel is frivolous. See 3 Benedict, Law of Admiralty, § 494 at 405-08 (6th ed. 1940).

50. On a theory that DOHSA did not preempt the separate remedy encompassed in state survival statutes that preserve in a decedent's estate the cause of action which up to the time of his death the decedent had for pain and suffering and would have been able to enforce had he survived, see Dugas v. National Aircraft Corp., 438 F.2d 1386 (C.A. 3, 1971), or on a theory based upon Dennis v. Central Gulf Steamship Corp., 453 F.2d 137 (C.A. 5, 1972), cert. denied, 409 U.S. 948, 93 S.Ct. 286, 34 L.Ed.2d 218, extended to offshore waters.

alive thereafter. His body was found on the weather deck at the forepeak, the furthermost point of the vessel from the storage platform. Cassel's body was found in his bunk, Armstrong's body was found in the sea, and Love's body was never found.

On these facts the District Court concluded that Monk must have been within the vessel when the flaming ball fell on it and was not killed immediately but sought to find some way of escape, and for a period of several minutes until death overtook him at the forepeak suffered excruciatingly. The court found that the explosion and fire on the platform caused "a flaming ball . . . to fall as if it were an exploding bomb onto the *Carryback*." The immediacy of the occurrence and the absence of other evidence make too speculative the finding that Monk survived for a matter of minutes and made his way to the forepeak.

11. Interest and attorney fees.

[33] The court awarded $10,738.82 to Dearborn against C & K for services of boat and crew under the oral agreement for the period actually used but disallowed prejudgment interest. Under well-settled admiralty rules the allowance of prejudgment interest is discretionary. Williams v. United States, 443 F.2d 1151 (C.A. 5, 1971). The court disallowed such interest to all property damage, personal injury and death claimants, and additionally, there was confusion whether invoices should be sent to C & K or DEI. There was no error in disallowing interest on this particular claim.

[34, 35] Dearborn complains of the refusal of attorney fees on the sum awarded for services of boat and crew,

under Article 2226, Texas Civil Statutes. Assuming that this state statute would apply to an admiralty contract, the award of fees is discretionary under Texas law, Rampy v. Rampy, 432 S.W.2d 175 (Tex. Civ. App. 1968), and the refusal to award was not error.

12. Relative fault and damages.

The extent of Dearborn's and Armstrong's fault is in question because of the manning and inspection and unseaworthiness issues. It is for the District Court, after determining these issues, to consider whether relative fault among the defendants, comparative fault of Armstrong, and division of responsibility for damages must be reconsidered and reallocated.

* * *

Affirmed in part and reversed in part. The judgment of the District Court is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 72-2704

DEARBORN MARINE SERVICE, INC

v.

CHAMBERS & KENNEDY

(April 23, 1975)

Brown, Chief Judge, dissenting from denial of rehearing en banc:

Executive Jet[1] is the first Supreme Court case abandoning the traditional "ebb and flow of the navigable waters" test for admiralty tort jurisdiction. Today the Court lets stand a panel decision extending the rationale of *Executive Jet* to produce the result that one man's death is governed by two different systems of law. I think the result is wrong but in any event the question thus decided is an important one—and, therefore, worthy of consideration by the full Court.

In cases where the *Executive Jet* result was urged, but rejected, e.g., Atlantic Transport Co. v. Imbrovek, 1914, 234 U.S. 52, 34 S.Ct. 733, 58 L.Ed. 1208, the Court has shown itself receptive to a broad concept of maritime service. While the language in Part I of *Executive Jet* is broad, the actual holding in Part IV is narrowly drawn.

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1 Executive Jet Aviation v. Cleveland, 1972, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454.

It relies heavily on the fact (i) air transportation involves problems sustantially different from those admiralty rules are designed to resolve, and (ii) the situs situation is highly fortuitous in cases of air disaster.[2]

I am not convinced either factor has a counterpart in this case. The problems land-based parties face in protecting persons aboard nearby vessels have long been dealt with by admiralty rules, e.g., Kelly v. Smith, 5 Cir., 485 F.2d 520, *cert. denied sub nom,* Chicot Land Co. v. Kelly, 1974, ____U.S.____, 94 S.Ct. 1991, 40 L.Ed.2d 558; Re Motor Ship Pacific Carrier, 5 Cir., 489 F.2d 152, *Cert. denied sub nom.* Union Camp Corp. v. Gypsum Carrier, Inc., 1974, ____U.S.____, 94 S.Ct. 2643, 41 L.Ed.2d 235. And I think the *Executive Jet* Court found fortuity an important factor because injury would have been sustained whether impact was with land or water. In this case Monk's situs on the High Seas was fortuitous, but he would not have sustained the instant injury *but for* that situs.

Nor should the panel have relied on Rodrique v. Aetna Casualty & Surety Co., 1969, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360, for the proposition "Congress did not intend that application of state law necessarily should cease at the physical boundaries of the platform."[3] To

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the extent the panel means to rely on OCSLA,[4] I think it incorrectly interprets both *Rodrique* and the legislative intent. The question Congress decided was whether to *extend* admiralty law inward—onto the platform. It decided not to, and relied on the *traditional* maritime principles relating to man-made structures attached to the ocean's floor—piers, wharfs, etc. I certainly find nothing in that rationale to support the panel's erosion of the traditional principles relating to persons injured on board vessels.

Experience demonstrates daily that *Rodrique,* conceived by the Court in the beneficent object of protecting and advancing the rights of shore-based workers employed on offshore platforms by applying to them the legal rights accorded by the adjacent state, actually diminishes them and subjects them and their heirs to awful consequences of technical rules long since rejected by the admiralty. Thus we see rights accorded by the admiralty—indeed held applicable vis-a-vis M/V Carryback—taken away by the Texas rule on contributory negligence. Today it is contributory negligence. Tomorrow it will be the state statute of limitations. *See,* Huson v. Otis Engineering Corp., 5 Cir., 1970, 430 F.2d 27 at 27-28, *aff'd on other grounds sub nom.* Chevron Oil Co. v. Huson, 1971, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296. Next month it will be the stringent Louisiana "statutory employer" defense. *See,* Roelofs v. United States, 5 Cir., 1974, 501 F.2d 87, 90 n. 7.

The panel's basic position is Monk's presence aboard the vessel was non-maritime in nature. We do not have to make either a blue water or *Sieracki*-ambiguous-am-

4. The Outer Continental Shelf Lands Act, 43 USCA § 1331, et seq.

phibious seaman out of him to make maritime principles the source of his (and his heirs') rights. But this Circuit has struggled long and hard with who is a "seaman", and I do not think those efforts were meant to be disturbed by the Supreme Court in the context of an airplane crash. To establish the ship-related status, I would apply by analogy the test announced in Offshore Co. v. Robison, 5 Cir., 1959, 266 F.2d 769, and just recently followed in Brown v. ITT Rayonier., 5 Cir., 1974, 497 F.2d 234. The main question under that test is whether "the duties which he performed contributed to the function of the vessel as to the accomplishment of its mission . . . ." Offshore Co. v. Robison, *supra,* at 779. The important thing is the particular mission of that vessel, not necessarily that of an ocean liner or the Weehawken Ferry.
In this case,

> [s]ince the platform was unmanned it was necessary that there be daily transportation from shore to platform and back to shore for those engaged in and supervising the work period. Also, of course, various materials, supplies, and equipment had to be transported to and from shore. . . . Each day for the period after it arrived from shore and until it returned to shore, the CARRYBACK remained in the vicinity of the platform, acting as a service and standby vessel. . . . the DEI supervisor, Monk, came aboard her to do office work where he could be away from the wind and noise of the platform and in air-conditioned surroundings.

499 F.2d at 267. While aboard M/V Carryback, Monk was certainly making a substantial contribution to that mission, because his needs were one of the important reasons the vessel was employed and there.

In *Brown, supra,* it was held appellant was not a "crew member", but Brown spent only about 1% of his employment time aboard any vessel. Even at that the Court recognized that the second part of the *Offshore* test (permanent assignment) should not be rigidly applied. *See,* Braniff v. Jackson Ave.-Gretna Ferry, Inc., 5 Cir., 1960, 280 F.2d 523, *rehearing denied,* 1961, 289 F.2d 939. In this case, Monk's employer required him to spend a substantial amount of time aboard M/V Carryback.

It at least appears to me that the Court has broken from the established rule in this Circuit—and its result appears contrary, also, to that in other Circuits, e.g., Slatton v. Martin K. Eby Construction Co., 8 Cir., 1974, 506 F.2d 505; and Lewis v. Roland E. Trego & Sons, 4 Cir., 1974, 501 F.2d 372, Both those cases recognize (i) the question is not whether the worker was directly involved with the vessel's *navigation,* but rather its function and (ii) the worker need not be exclusively assigned to duties on the vessel.

Finally, this Reverian "one-if-by-land, two-if-by-sea", United States v. Ingham, 5 Cir., 1974, 502 F.2d 1287, 1290, approach, in which the very same person (Monk) on the very same vessel (M/V Carryback) for the very same catastrophe growing out of the very same acts or non-acts has rights measured under two antithetical standards depending on who is the pursued, introduces awful technicalities which in its generous liberality of both substance and procedure is anathema to the admiralty.

I would reverse the panel on the merits of this issue. But at the least it deserves reconsideration by the whole Court, considering the volume of OCSLA cases in the Fifth Circuit in the Nation's quest for precious energy.

Supreme Court, U. S.
FILED
JUL 7 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

75-30

LUCILE MONK, ET AL., *Petitioners*

v.

CHAMBERS & KENNEDY, ET AL., *Respondents*

SUPPLEMENTAL APPENDIX

SIDNEY RAVKIND
MANDELL & WRIGHT
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APPENDIX A

Complaint of DEARBORN MARINE SERVICE, INC., C—W—D, Inc., Thoroughbred Marine Services, Inc., and Freeport Operations, Inc., for Exoneration from or Limitation of Liability of the OIL SCREW CARRY-BACK.

Webster Barnwell ARMSTRONG, III,
Individually, etc., et al.,
Plaintiffs-Appellees,

v.

CHAMBERS & KENNEDY et al.,
Defendants-Appellees-Appellants,

ESTHER M. LOVE,
Intervenor-Appellant-Appellee.

No. 72-2704.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

APRIL 7, 1975.

Dissenting Opinion April 23, 1975.

Appeal from the United States District Court for the Southern District of Texas, John V. Singleton, Jr., Judge, 340 F.Supp. 1220.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion August 22, 1974, 5 Cir., 1974, 499 F.2d 263).

Before AINSWORTH, GODBOLD and INGRAHAM, Circuit Judges.

PER CURIAM:

The Petition for Rehearing filed by Defendants-Appellants Dearborn Marine Service, Inc., C—W—D, Inc., Thoroughbred Marine Services, Inc., and Freeport Operators, Inc., is overruled. With respect to that petition, no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

The petition for rehearing filed by appellees Lucille Monk, et al., surviving dependents and personal representative of the estate of William C. Monk, deceased, is overruled. With respect to that petition, the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also denied, from which denial Chief Judge Brown dissents.

BROWN, Chief Judge, dissenting from denial of rehearing en banc:

Executive Jet[1] is the first Supreme Court case abandoning the traditional "ebb and flow of the navigable waters" test for admiralty tort jurisdiction. Today the Court lets stand a panel decision extending the rationale of *Executive Jet* to produce the result that one man's death is governed by two different systems of law. I think the

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409 U.S. at 267, 93 S.Ct. at 504, 34 L.Ed.2d at 467.

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I would reverse the panel on the merits of this issue. But at the least it deserves reconsideration by the whole Court, considering the volume of OCSLA cases in the Fifth Circuit in the Nation's quest for precious energy.

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term 1972

No. 72-2704

D.C. Docket No. CA 70-H-1171; 70-H-713; 71-H-360, et al.

IN THE MATTER OF THE COMPLAINT OF DEARBORN MARINE SERVICE, INC., C-W-D, INC., THOROUGHBRED MARINE SERVICES, INC., and FREEPORT OPERATORS, INC., for Exoneration from or Limitation of Liability of the Oil Screw CARRYBACK

WEBSTER BARNWELL ARMSTRONG, III, Individually, etc., et al., Plaintiffs-Appellees,

CHAMBERS & KENNEDY, et al., Defendants-Appellees-Appellants,

ESTHER M. LOVE, Intervenor-Appellant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

Before AINSWORTH, GODBOLD and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court;

It is further ordered that each party bear his own costs on appeal in this Court.

August 22, 1974

Issued as Mandate: April 15, 1975

APPENDIX C

WEBSTER BARNWELL ARMSTRONG, III, et al.

v.

CHAMBERS & KENNEDY et al.

Civ. A. No. 70-H-1171

United States District Court,
S. D. Texas,

Houston Division

Jan. 11, 1972

As Amended March 7, 1972.

(340 F.Supp. 1220)

Action to recover from owner of unmanned offshore collection platform for oil wells, engineering firm hired to operate and maintain platform, subcontractor hired to refurbish platform and others to recover for deaths, personal injuries and property damage resulting from explosions and fire on platform. The District Court, Singleton, J., held that platform owner was strictly liable for failure to comply with requisite federal safety regulations, that engineering firm was negligent in failure to warn subcontractor of danger of welding on equalizer line leading to partially filled oil tanks and that subcontractor was negligent in failing to properly supervise welding operation on equalizer line. In addition, the Court held that engineering firm was liable, both contractually and in tort, to indemnify owner.

Order accordingly.

* * *

Warner F. Brock, Brock & Williams, Houston, Tex., for plaintiffs.

Frank Harmon, Baker & Botts, Houston, Tex., for defendants.

Memorandum and Order:

SINGLETON, District Judge.

Late in the afternoon of May 28, 1970, explosions and fire occurred on the Chambers & Kennedy (C & K) Offshore Oil Platform, an unmanned collection platform for oil wells in Block 189-L, located 12 miles southeast of Galveston, Texas. The holocaust that ensued resulted in the death of five workmen, one supervisor, and three crew members of the standby boat, M/V CARRYBACK, which was moored below the platform. Six other platform workers were hospitalized. The burning vessel was retrieved, but the damage it sustained rendered it beyond repair. All of the tanks on the platform were destroyed or distorted beyond repair. The platform itself received severe damage calling for extensive repairs. The oil in the tanks ultimately found its way to a part of the beaches near Galveston necessitating substantial costs in removing this pollutant.

The complexity of the liability issues here in question dictates a thorough review of the events which culminated in this tragic loss of life and property. C & K had purchased the platform with a capacity of 5,000 barrels of oil in a somewhat deteriorated state in 1968. After some discovery wells were drilled, the platform was used to store crude oil which was produced from satellite wells 4,000 feet from the platform. Crude oil from one producing well was piped through a separator to a cylindrical

tank called a gun barrel. When this tank filled, the oil flowed into one of five storage tanks, thence through equalizing lines to the other four tanks. The tanks were sounded regularly, and when enough oil had accumulated, it was transported by barge to the shore. C & K hired, under a written well service agreement dated December 1, 1968, the engineering firm of Drilling Engineering, Inc. (DEI) to operate and maintain the platform. This agreement included an indemnity clause that will be thoroughly discussed later. It was the intention of the parties to the contract, C & K and DEI, that all work in question that was to be performed on the platform, including repairs, alterations, production of the wells, and all work necessary to bring the platform up to the standards and regulations set by the United States Geological Survey was to be carried out under the December 1, 1968, contract. The cutting of the equalizer valve was work done under this contract and in compliance therewith. A letter dated April 28, 1970, was nothing more than a report from DEI to C & K on the status and progress of the platform work and, as stated in the letter, an outline of work "required for compliance with United States Geological Survey requirements" (Harvey Exhibit 4). This letter did not constitute a new agreement between the parties.

On March 18, 1970, Mr. George Kinsel of United States Geological Survey wrote Lyle Harvey of C & K and suggested that the platform be brought into compliance with 30 C.F.R. 250.49 and 30 C.F.R. 250.46 safety regulations. On April 3, 1970, Mr. Kinsel called Mr. Harvey suggesting that C & K voluntarily shut down the field.

On April 8, 1970, all production from all the wells was ordered shut down by Mr. Harvey, an employee of

C & K. This order was communicated to Mr. Chenier of DEI. At least as of April 10th all production was shut down. On April 11th all of the oil that was then in the tanks was taken out by means of a barge. Thereafter and sometime between April 11 and May 28, some production out of one of the wells came about and somewhere in the neighborhood of 1,100 barrels of oil was pumped into the tanks.

C & K knew that this oil was in the tanks through Mr. Harvey. DEI knew that this oil was in the tanks through Mr. Chenier. At this time, Mr. Ray was DEI's engineer on the job, and Mr. Ray knew that this oil was in the tanks.

On May 23rd, Mr. Ray had to leave the job because of an abscessed tooth and Mr. Monk took over and became the DEI engineering supervisor on the job, working under Mr. Chenier. Mr. Ray told Mr. Monk that there was oil in the tanks, so that as of at least May 23rd, Mr. Monk knew there was oil in the tanks.

In the course of their work, DEI hired Fenstermaker, Behling, Pollock & Associates, an engineering firm of Lafayette, Louisiana, to make a studied survey of the platform and the anticipated needs for the restoration work contemplated. It is important to note that in the report to C & K developed from the Fenstermaker study, DEI did not recommend incurring the expense of draining any residue oil from the tanks. The platform had been shut down for alterations and repairs for several weeks prior to the casualty. The work on the platform consisted mainly of sandblasting, painting, renovation of the structural members, installation of prefabricated drip pans under the oil tanks, and fitting a closed draining sump sys-

tem. This work necessitated burning and welding on the platform but testimony indicates that any hot work was to be done on the end of the platform furtherest away from the oil storage tanks.

DEI did not have the manpower called for to complete the operations required, thus they had in turn contracted out the actual physical labor needed on the platform to the firm of Hydrotech. However, as of May 23, 1970, DEI had become dissatisfied with Hydrotech's performance and had decided to hire another firm to supply the men to complete the work. Mr. Williams, president of DEI, contacted Chapman Contracting Service Company (Chapman) to take over the job. On Sunday, May 24th, Ricky Chapman, vice president of Chapman, met with William Ray, a member of the DEI firm and at one time the DEI supervisor on the platform, in Galveston to discuss the job. At that time, Mr. Ray told Mr. Chapman some of the details of the job and the working conditions that existed on the platform, namely, that there was oil in the tanks, that the platform was like working on a bomb, that it was necessary to use good safety regulations, and that everyone should be extremely cautious. Mr. Ray explained that Mr. Monk, the deceased DEI supervising engineer, was in charge of the job. Mr. Ray also explained that the work consisted of certain tasks that necessitated welding. On Sunday, May 24th, Ricky Chapman went to the jobsite and inspected the platform himself. The following Monday, May 25th, Mr. Chapman asembled twenty-two workmen including four supervisors for the work. On Tuesday, May 26th, the Chapmen men did their first day's work on the C & K platform. Ricky Chapman along with Mr. Chenier, a DEI engineer, were both on the platform again on the day of the explosion, leaving two hours before the casualty.

All of the Chapman workers, as well as the DEI supervisors, were transported from the shore to the platform every day, used the facilities of, and received their meals on the standby boat, the M/V CARRYBACK. The M/V CARRYBACK, operated by Dearborn Marine Services, was a boat without an inspection certificate and captained by an unlicensed master. The corporations Freeport Operators, Dearborn Marine, and Thoroughbred are all owned by one parent company, all having interlocking directors and officers. For the purposes of this case, they have agreed to and will be treated as one entity. Joe Dyer was an officer of each of these corporations. Mr. Dyer had the authority to hire and fire employees and to make contractual arrangements regarding the use of the boats, including the CARRYBACK, owned and/or operated by Dearborn Marine and to supply crews that were on the payroll of Freeport Operators to man the boats. Thoroughbred owned all of the boats including the CARRYBACK and had an arrangement with Dearborn Marine whereby Thorougbred bare-boat chartered the boats to Dearborn.

On Wednesday, May 27th, three representatives of the United States Geological Survey landed by helicopter on the platform and advised the engineer in charge that it was going to be necessary to remove a valve from the overflow line between two of the crude oil storage tanks. This was required to bring the platform into compliance with U.S. anti-pollution regulations. However, at some time before the casualty, Mr. Chenier, an employee of DEI, had been advised by Mr. Kinzel of the United States Geological Survey that the valve on the equalizer line had to be removed. On the day of the casualty but before the explosion, Mr. Chenier discussed with Mr. Monk the necessity for the removal of the valve. The removal of this

equalizer valve was the first work on the platform to require the breaking of any connections leading to the oil storage tanks. Indeed, on the day of the casualty, but before the explosion, Mr. Monk, the DEI supervisor, discussed with Mr. Overly, the Chapman foreman, the operational aspects of the removal of the valve from the equalizer line.

On the day of the casualty but before the actual casualty, Mr. Overly instructed Mr. Scanlan, a pusher for Chapman, to remove the valve from the equalizer line. Mr. Scanlan, along with the two other Chapman employees, began working on the equalizer line and broke the union and cut the pipe with a pipe cutter. They took out the valve leaving a part of the equalizer line protruding in place. They then proceeded to take the valve and the other part of the equalizer line to the south end of the platform beneath the heliport and there fabricated, or threaded, a new piece of pipe called a nipple to put back in the equalizer line and reconnect it. Mr. Scanlan then went back to the equalizer line and screwed the new nipple in place. This procedure left two pieces of pipe to be connected together. Mr. Scanlan talked to Mr. Monk and told Mr. Monk that he was going to connect these two pieces by welding them. The facts do not reflect where this conversation took place—whether on the platform or on the CARRYBACK. The facts do not indicate whether or not Mr. Monk told Mr. Scanlan to weld the line *in place*, or whether Mr. Scanlan told Mr. Monk he was going to weld the line in place. But the facts do reflect that at some time before the explosion Mr. Scanlan told Mr. Monk he was going to weld the line.

On the day of the accident, the wind was blowing between five and eight knots, there was work being performed on the platform in the area of the scrubber in connection with which welding operations were being conducted, there were two diesel compressors operating, there were sandblasting operations going on, and all-in-all, the conditions at the side were such that there would have been difficulty encountered in oral communications between workers.

Mr. Scanlan told Mr. Gaspard, a Chapman welder, and Mr. Breaux, a welder's helper, to weld together the two pieces of pipe that now constituted the equalizer line. Mr. Overly should have known of the anticipated welding on the equalizer line and should have been in the area in which the work on the equalizer line was going on. Mr. Gaspard began the welding and at the time that he struck an arc, there was an explosion. Burning oil then rapidly spread fire across the platform, resulting in injuries and damage there.

The explosion caused flaming oil to be blown up directly above the platform into a flaming ball then to be carried by the wind over the water and to fall as if it were an exploding bomb onto the CARRYBACK. Thus, the CARRYBACK was instantaneously wrapped in consuming fire. At this moment of time, Captain Armstrong, crew members Love and Cassel, and Mr. Monk were all on board the CARRYBACK and all perished.

Chambers & Kennedy filed a civil action against DEI and Chapman seeking recovery of all damages and losses sustained by them as a result of the extensive damage done to the platform, and expenses entailed in cleaning up and controlling the pollution which resulted from the oil which escaped into the water in connection with the explosion in the storage tanks, and also sought indemnity

against DEI and Chapman against any claims by third parties. Dearborn Marine Service filed a limitation of liability proceeding, seeking exoneration or limitation of liability as the owner *pro hac vice* of the M/V CARRYBACK. The heirs of Webster Armstrong, Master of the CARRYBACK, filed a civil action seeking to recover damages on account of the death of Captain Armstrong, against C & K, DEI, Chapman, and Freeport Operators. The other crew members on the CARRYBACK joined in that suit. A number of Chapman employees intervened in the Armstrong suit, seeking to recover their damages against C & K and DEI.

The heirs of Mr. Monk file suit seeking to recover damages for the death of Mr. Monk against C & K, Chapman, and the boat company.

Additional civil actions were filed in federal court in Lafayette, Louisiana, by employees of Chapman, seeking damages against C & K and DEI and were by agreement of the parties transferred to this court and consolidated for trial with the above-captioned causes on the question of liability only.

Prior to trial, settlements were made of the cases of the crew boat captain and crew, under the terms of which all claims and causes of action for the death of the master and crew of the CARRYBACK were assigned to the attorneys representing the underwriters of C & K and DEI, save and except whatever cause of action there might be against Freeport Operators and Dearborn, with the proviso that no recovery would be made on such claim or cause of action against the boat company, should the boat company be entitled to indemnity from either DEI or C & K or Chapman.

All of the defendants, C & K, DEI, Chapman, and the boat companies, sought indemnity and contribution from each other.

During the course of the trial, C & K and the boat company, with the approval of DEI, agreed to a settlement of their property damage claims against Chapman. Therefore, their suits for property damage against Chapman are dismissed. The attorneys representing C & K and DEI's underwriters also move the court during the trial to dismiss on behalf of Armstrong, Cassel, and Love as to C & K and DEI. Accordingly, the motion to dismiss is granted.

JURISDICTION

[1, 2] The litigation involving the platform itself and all the workers injured or killed thereon, as well as all the subsidiary issues raised by these suits, is controlled by the provisions of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333. This statute makes applicable the laws of the adjacent state, in this case, the State of Texas, "to the extent that they are applicable and not inconsistent . . . with other Federal laws and regulations." Rodrique v. Aetna Casualty & Surety Co., 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1967); Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).

Concerning the deaths and injuries that arose from the men jumping into the water from the platform, the Outer Continental Shelf Lands Act will apply. Bertrand v. Forest Oil Corp., 441 F.2d 809 (5th Cir. 1971).

[3] In regard to claims arising from casualties on navigable waters, such as the one here involving the CARRYBACK, the crew members Armstrong, Cassel, and Love,

and the engineer Monk, general maritime law will apply along with statutory enactments of a remedy for Death on the High Seas. 46 U.S.C. § 761 et seq. The Supreme Court has clearly stated that "an action does lie under general maritime law for death caused by violation of maritime duties." Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) (accident within state water limits).

LIABILITY OF C & K

The Outer Continental Shelf Lands Act enacted on August 7, 1953, authorizes the Secretary of the Interior at any time to prescribe and amend such rules and regulations as are appropriate and necessary for the regulation of oil leases on the Outer Continental Shelf. Pursuant to this enabling legislation, the Secretary has promulgated the following rules:

> "§ 250.45 Accidents, fires, and malfunctions.
>
> In the conduct of all its operations, the lessee shall take all steps necesary to prevent accidents and fires, and the lessee shall immediately notify the supervisor of all serious accidents and all fires on the lease, and shall submit in writing a full report thereon within 10 days. The lessee shall notify the supervisor within 24 hours of any other unusual condition, problem, or malfunction.
>
> "§ 250.46 Workmanlike operations.
>
> The lessee shall perform all operations in a safe and workmanlike manner and shall maintain equipment for the protection of the lease and its improvements, for the health and safety of all persons, and for the preservation and conservation of the property and the environment. The lessee shall take all necessary precautions to prevent and shall immediately remove any hazardous oil and gas accumulations or other health, safety or fire hazards."

[4] This court must interpret the congressional intent and the Secretary's reasons for promulgating the regulations as imposing certain nondelegable duties upon C & K, as the lessee and owners of the platform. The public policy indicated by these legislative and administrative acts are imperative to the common good and protection of our national community. Thus, *any* violation, even a nonfeasance, of the guidelines set as preventive measures to accidents must expose the lessee to ultimate liability in tort. C & K was continuely aware of the shabby condition of the platform, the presence of oil, and other "safety and fire hazards" like oil-soaked boards as well as the very notification by officials of the United States Geological Survey that the platform was substandard according to regulations and needed to be brought into compliance with such regulations (Harvey Exhibits 13, 14, and 15). Indeed, this was part of the very reason for the work on the platform. Safety equipment on the platform was also inadequate for only one life buoy and four work vests were available on the platform on May 28th.

[5] Even if this nondelegable duty were not set by statute, the court would have to impose it. The exploration and development of offshore oil resources under the seas is a relatively new area of technological progress. Unlike the search for oil and gas on land, it presents new and more dangerous challenges in its development. 35 Tex.L. Rev. 1; 33 Tex.L.Rev. 574; Warren Petr. Corp. v. Martin, 153 Tex. 465, 271 S.W.2d 410, reh. den. (1954). Thus, the duty placed here upon the oil lessee is similar to the traditional tort duty of one using an ultrahazardous

substance. The basic soundness of this reasoning is revealed by the position taken by the Restatement Torts Second:

> " §416. Work Dangerous in Absence of Special Precautions
>
> One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise.
>
> "§ 427. Negligence as to Danger Inherent in the Work
>
> One who employs an independent contractor to do work involving a special danger to others which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused to such others by the contractor's failure to take reasonable precautions against such danger."

Contra Parsons v. Amerada Hess Corp., 422 F.2d 610 (10th Cir, 1970) (this case did not adopt this Restatement theory).

[6-8] Texas law seems to circumvent this theory of an occupier's, or owner's, or employer's duty under the holding of Delhi-Taylor Oil Corp. v. Henry, 416 S.W.2d 390 (Tex. 1967). *Delhi-Taylor Oil Corp., supra,* also seems to be a special exception carved out by the Texas courts

to insulate the landowner once he warns the contractor of any dangerous conditions. Gulf Oil Corp. v. Bivins, 276 F.2d 753 (5th Cir., 1969), is similar to this Texas case. *Bivins* involved a land-based well where the injured employee had bled the well himself but was not warned of the presence of iron sulphide which supposedly ignited the explosion. The court held that a warning given to the foreman and not the injured workman by the owner could and did discharge its liability. However, these cases do not involve a statutory duty upon the owner to comply with certain safety regulations on their premises. Under the authority of these cases the facts of the instant case reveal that C & K gave DEI an adequate warning as to the condition of the premises, thereby satisfying C & K's common law duty to any subcontractor's employee who was injured.

Nevertheless, this does not extinguish the strict liability imposed upon C & K because of the violation of the government regulations. The violations of the instant safety requirements are undoubtedly a proximate cause of the damages and deaths that occurred. Under all the evidence, it is manifest and indisputable that the loss of life (other than Gaspard), the burning of the CARRYBACK and the four men aboard that vessel, and a substantial part of the damage to the platform itself was caused by burning oil rather than the explosion. The failure to remove this oil and the resultant oil-soaked platform was in direct violation of 30 C.F.R. 250.46. All of the oil except the heavy sludge in the tank bottoms could have been floated out and barged away as was in fact done with a portion of the oil. Therefore, C & K cannot escape the statutory liability imposed upon it by these regulations.

LIABILITY OF DEI

[9-11] The responsibilities assigned to DEI by C & K are spelled out in the written well service agreement dated December 1, 1968. In that agreement, DEI contracted to operate the platform and the production equipment. DEI further agreed to follow United States Coast Guard and United States Bureau of Land Management regulations and do their job in a workmanlike manner.

> "DEI shall take cognizance of all regulations issued by the United States Coast Guard, United States Bureau of Land Management and other regulatory authorities affecting said offshore facilities, and any future amendments and modification thereof, and shall cause said offshore facilities to be maintained and operated in accordance with such regulations (including the preparation and filing of any reports required by such regulations), or if DEI is unable to comply with such regulation, DEI shall promptly notify ZAPATA—C & K, and shall render such assistance as ZAPATA—C & K, may reasonably request in order to comply with such regulations.
> "DEI agrees to make minor repairs and such adjustments of production equipment, machinery and appurtenances as would appear reasonably necessary to a prudent operator.
>
> * * *
>
> "DEI shall perform the services to Zapata-C & K required herein in a good and workmanlike manner and shall have the right and duty to conduct and perform such services in accordance with what a prudent operator would do under the same or similar circumstances." Contract of December 1, 1968 (Harvey Exhibit 12).

The elements of this agreement set the limits of contractual liability as between DEI and C & K. It would be difficult to say that DEI's failure to observe the letter of the regulation found in 30 C.F.R. § 250.46 by not removing any hazardous oil results in strict liability in tort for DEI, since DEI is not the lessee. Nevertheless, measured by the common law standards of duty in tort, DEI's actions and omissions are held to constitute negligence. DEI must be held responsible for the negligent and lackadaisical manner in which the removal of the equalizer valve was conducted. Mr. Chenier himself was on the platform in the midst of this operation and took no steps to insure a safe and workmanlike performance of the task. Mr. Chenier was Mr. Monk's superior in the DEI organization, who had been in charge of the overall platform operations from the beginning of the work. Consequently, Mr. Chenier, although not continuously or daily on the platform, was ultimately more familiar with the status of the job and procedures to be followed. Mr. Chenier is also the one who would have known if a dresser coupling had been ordered to complete the removal of the equalizer valve without a need for welding. Mr. Chenier's more extensive knowledge would be based not only on his position in firm operations, but also on the fact that he had worked continually with the C & K platform and Mr. Monk had replaced Mr. Ray, the previous platform supervisor, only a few days before the explosion. DEI's failure to notify C & K of the extremely volatile condition on the platform or to initiate safety precautions of its own once the equalizer lines were cut and the vapors from the tanks were being emitted into the area of work, represents not only a violation of the ordinary, prudent man standard, but also a high disregard for human life.

As to the equalizer line, DEI had known since September 16, 1969 (Harvey Exhibit No. 18) that the equalizer line as part of the storm choke system had to be removed. DEI knew that this was work that would have to be done by Chapman and its employees. DEI did not adequately warn Chapman and its employees of the dangers incident to removal of the equalizer line. Mr. Chenier was intimately familiar with this platform; he knew of its condition; he knew that there was oil in the tank into which the equalizer line was connected; he knew that the valve on the equalizer line had to be removed; and it is not unreasonable to conclude that he could have and should have anticipated the possibility of the breaking of the equalizer line in order to remove the valve. This is particularly significant in the Mr. Chenier is the only person on the platform who would have known whether or not a dresser coupling had been ordered to be used in the operation of removing the valve from the equalizer line. If a dresser coupling were to be used, there would be no welding, merely a breaking of the union and a recoupling of the line.

On the day before the explosion, representatives of the United States Geological Survey were on the platform and at that time specifically told Mr. Monk to remove the equalizer line. There is no evidence that any employee of Chapman was in on that conversation. Taking all of these factors into consideration, this court concludes that the warnings given by DEI's supervisory personnel, Mr. Chenier and Mr. Monk relating to the specific work of removing the valve on the equalizer line were not adequate warnings of the dangers involved. It is for this reason that the holding by the Supreme Court of Texas in Delhi-Taylor Oil Corp. v. Henry, *supra,* is not controlling

in this case insofar as a defense to DEI. It should also be noted that in *Delhi-Taylor, supra,* the warnings were given to experienced foremen with long histories of work in the gas-line fields. This was not the case with Chapman.

In summary, the failure of DEI in the following particulars constituted a failure to exercise reasonable care and proper supervision when viewed in the context of where the work was being performed and the inherent nature of same:

(1) to suspend all burning and welding operations while the equalizer line was open as a result of the removal of a section of the line;

(2) to seal this opening until that section of the line had been replaced;

(3) to carefully supervise the removal and reinstallation of the line to see that no welding or other work that could possibly produce an ignition would be undertaken in the performance of this operation; and

(4) to post warning signs on the tanks with instructions that no welding or hot work be done in this area.

All of these matters constituted negligence *per se* because each of them was a violation of the above-quoted regulations issued by the Secretary and each was a proximate cause of the fire and explosion which resulted in the deaths, personal injuries, and property damage involved herein.

CHAPMAN'S LIABILITY

[12-14] Chapman's liability is based upon the failure of its supervisors to adequately and competently oversee

the work of its employees. Mr. Overly, the head of the Chapman crew on the platform had control over the Chapman employees and the details of the job at the time the work was being performed on the equalizer line. Ricky Chapman, the highest ranking Chapman employee directly involved with the platform, like Mr. Chenier, was himself on the platform the day of the casualty. Ricky Chapman had personally surveyed the platform before he contracted to provide the workmen. However, it is significant that this was the first job that Ricky Chapman had ever been involved with relating to work on an offshore drilling platform. He was aware as a result of his visit to the platform on Sunday, and his conversation with Mr. Ray, that this was hazardous work. However, it is the attempt to remove the equalizer line and the welding on that line that brought about the personal injuries and property damage that are involved in this case.

Ricky Chapman was present when the equalizer valve was cut and was negligent in not making sure there would be no welding in the area when the tanks' vapors were being emitted. Ricky Chapman was told by Mr. Ray on the Sunday preceding the casualty that the tanks had oil in them. Surely any reasonable, prudent man in the same or similar circumstances would have checked on the type of tanks his men would be working on in such a hazardous situation and would have advised or seen that his men were advised of the fact that there was crude oil in the storage tanks, and it was, therefore, not going to be safe to do any welding work on the tanks or on the lines leading into the tanks. It would not have been unreasonable for Chapman, in the absence of DEI's doing so, to post signs on the tanks to assure that all his men were aware of the contents of the tanks and the danger involved.

Other than Ricky Chapman, the Chapman employees who testified were Mr. Overly, who was the supervisor of the Chapman employees on the platform at the time; Mr. Scanlan, who was one of the tool pushers and, in that capacity, was the supervisor of Mr. Gaspard, the welder who actually ignited the vapors by attempting to weld on the equalizer line; and Mr. Breaux, who was Mr. Gaspard's helper. Of these four witnesses, this court ascribes the greater weight to Mr. Scanlan's testimony on the crucial issue of the welding on the equalizer line and the warnings given relating thereto.

Mr. Scanlan testified that he did not know there was oil in the tank; that Mr. Overly told him that the tanks were safe; that he understood that to mean the tanks were not flamable; and that no one ever told him not to weld on the tanks or on the equalizer line involved. Mr. Scanlan testified that on the day before the explosion Mr. Monk told him that the valve in the equalizer line had to come out. Mr. Scanlan recalled in detail that the workmen were unable to remove the valve with wrenches, and that he asked Mr. Overly what to do, and Mr. Overly told him to get a pipe cutter and cut it out. Mr. Scanlan also testified that he discussed welding with Mr. Monk and that he told Mr. Monk he had to weld the pipe, although he did not tell Mr. Monk that he was going to weld on the line in place. Mr. Scanlan then testified that he directed Mr. Gaspard to do the welding on the equalizer line. If Mr. Scanlan had been so warned, as it was Chapman's duty to do, then it is most probable that Mr. Scanlan would not have directed the welder, Mr. Gaspard, to undertake to do any welding on the line in place. The failure to warn Mr. Scanlan of the presence of crude oil in the storage tanks constituted negligence on the part of

Chapman which was a proximate cause of the resulting explosions and fire. Mr. Scanlan was negligent in not inquiring in greater detail about permission to weld in place from Mr. Monk, considering the noisy circumstances in which the question was asked. Mr. Scanlan, in his supervisory capacity, was also negligent in directing the welder to undertake to make a weld on the lin without checking on the contents of the tanks himself. Reasonable prudence on his part would have required him to look into the tanks, through the hatch covers located on the tops of the tanks to check for the presence of crude oil and gaseous vapors in the tanks, before telling the welder to attempt to make a weld on the pipe. .

It is inconceivable that Mr. Monk would have approved welding work on the line while it was in place between the tops of the two crude oil storage tanks, which, it must be concluded, he knew contained crude oil. The evidence is rather vivid that the conditions on the platform when Mr. Scanlan asked Mr. Monk about the welding were less than ideal for communications; there were all types of machinery and work going on with the sea roaring and winds blowing. Thus, it is more than probable that Mr. Monk did not hear or understand Mr. Scanlan to be inquiring about welding in place on the tanks. Both Mr. Scanlan and Mr. Monk should have proceeded with caution and made certain that they fully understood the details of how the work was to be done in this extremely dangerous zone.

Mr. Gaspard, the welder who struck the incindiary arc, relying upon the orders of his supervisor, the pusher Scanlan, made preparations for welding the lines that lead into the tanks which resulted in the casualty. Mr. Gaspard's reliance on Mr. Scanlan's order was not negligent. However, his action in striking the arc pursuant to Mr. Scanlan's order was the proximate cause, not only of his own death, but also the other deaths, injuries, and damages which followed from the explosion and fire; and Chapman under a respondeat-superior theory is responsible for Mr. Gaspard's actions.

Mr. Scanlan's negligence is imputed to his employer, Chapman Contracting Service Company. Of course, the negligence on the part of Ricky Chapman in failing to see that all of his employees were specifically instructed concerning the hazards involved in the welding work on the lines and tanks is imputed to his company; and all of such negligent conduct on the part of Ricky Chapman, as well as his employees in the course of their employment, were proximate causes of the fire, explosions, and damages resulting therefrom.

[15] The negligent conduct on the part of Chapman Contracting Service Company was a proximate cause, not only of the fire and explosions in the tanks and the damage to the tanks and the platform, and Mr. Gaspard's loss of life, but was also a cause of the deaths aboard the CARRYBACK. Chapman cannot escape liability for the consequences of its conduct, because it might have been possible for someone else to have filled the tanks with water, so as to minimize the effect of an explosion. Chapman was never told that the tanks had been filled with water or had been made inert and safe to weld upon, but had been given a warning that the tanks did in fact contain crude oil.

[16] Likewise, Chapman's defense that it was not truly an independent contractor and responsible for the occurrences on the platform must be totally rejected. The Texas

courts rejected that argument thirty years ago in a well-articulated opinion where a company owning special machinery and equipment and trained men for oil well work entered into a contract with a drilling company to "rent" such equipment and men. The lending company was held to be an independent contractor and liable for its employee's negligence.

> "[The lending company] takes the position that it all over invariably operates under its work orders with the express understanding and intention to rent all those who desire its services its special machinery and equipment and employees for squeeze jobs. The attitude is little, if anything, short of saying to those who need and desire to avail themselves of that specialized service that we own the necessary equipment and men which we rent or hire out for such purposes, the men upon the same basis as the equipment. It takes us back to our own ante-bellum days, to say nothing of the conditions our forebears fled. To permit individuals or concerns to commercialize the services of men on such basis is repugnant to all our American ideas of individualism and contrary, we think, to public policy." Herndon v. Halliburton Oil Well Cementing Co., 154 S.W.2d 163, 169 (Tex. Civ. App.—El Paso, 1941 rehearing denied).

Under the circumstances, the presence of crude oil in the storage tanks, being known to Chapman Services, not only by Ricky Chapman, but also by his superintendent, Mr. Overly, does not permit Chapman to escape the consequences of their negligent conduct because of the quantity or amount of crude oil in the storage tanks. Accordingly, the negligence on the part of Chapman Contracting Service Company and its employees was a proximate cause of the deaths on the CARRYBACK, as well as the dam-

ages to that vessel and the damages and injuries on the platform.

C & K's INDEMNITY

In the written well service agreement of December 1, 1968, referred to earlier (attached as Appendix I), DEI contractually agreed to indemnify C & K in the event of any of three types of occurences:

"1. DEI will indemnify C & K if

(a) there is an injury to a DEI employee, and

(b) the injury is incident to or resulting from the operations or services performed by DEI.

"2. DEI will indemnify C & K if

(a) someone other than a DEI employee is injured, and

(b) the injury is caused by a negligent act or omission on the part of DEI, its servants, agents and employees.

"3. Any sub-contractor will indemnify Zapata-C & K if

(a) the sub-contractor or one of its employees or agents receives an injury, and

(b) the injury is incident to or results from the operations of, or services performed by, the sub-contractor."

This court agrees with Justice Walker of the Texas Supreme Court when he said in a recent opinion

> "In some cases it is fairly easy to discern an intention to afford protection even against the consequences of the indemnitee's negligence. The intent is usually clear, for example, where one person under-

takes to indemnify another against liability for injuries or damage caused by defects in certain premises or resulting from the maintenance or operation of a specified instrumentality. When the indemnity agreement is expressed in these terms, the indemnitor ordinarily knows and certainly should be aware that he is assuming full responsibility for the particular premises or instrumentality. See Mitchell's, Inc. v. Friedman, 157 Tex. 424, 303 S.W.2d 775; Houston & T. C. R. Co. v. Diamond Press Brick Co., 111 Tex. 18, 222 S.W. 204, 226 S.W. 140; Stewart & Co. v. Mobley, Tex. Civ. App., 282 S.W.2d 290 (writ ref.). The indemnity provisions in this case . . . are incident to an undertaking by a subcontractor to do certain concrete work for the prime contractor. Agreements of that nature are usually made primarily to protect the general contractor against loss of liability resulting from operations or physical conditions over which he has no control and which are under the control of the subcontractor. See North American Ry. Const. Co. v. Cincinnati Traction Co., 7th Cir., 172 F. 214." Joe Adams & Son v. McCann Constr. Co., Tex., 475 S.W.2d 721, 724 (1971).

In that case a general contractor's written indemnity contract with the subcontractor was not upheld. There the general contractor laid forms for the subcontractor to use in pouring concrete. The forms collapsed in pouring operations injuring the subcontractor's employees. The contract indemnified the general contractor in broad terms and only denied indemnity in the event of "direct negligence" by the general contractor. The Supreme Court agreed with the trial court that the negligence of the general contractor would prevent it from receiving the protection of the indemnity clause when strictly construed in light of the whole contractual agreement. *See* generally Spence

& Howe Constr. Co. v. Gulf Oil Corp., 365 S.W.2d 631 (Tex. 1963).

[17-19] The case at bar presents a different situation from that presented in *Adams & Son, supra.* Here, there was no evidence presented that C & K ever performed any work at any time on the platform. To the contrary, all of the evidence leads to the inescapable conclusion that C & K turned over to DEI all of the work on the platform. Further, with reference to the condition of the platform, any repairs to the platform making the platform comply with the United States Geological Survey regulations and removing all of the oil out of the tanks on the platform, the evidence is clear that C & K turned over to DEI responsibility and actual conduct of all of these matters and this type of work. (*See* the written well service agreement paragraphs I(3) and VII attached to this Memorandum and Order as Appendix II.) In connection with the work that was being performed at the time of the casualty, DEI and its subcontractor Chapman were performing the only work on the platform and Dearborn was supplying the only ancillary service required for work on the platform. As pointed out above, the indemnity agreement contained in the well servicing agreement is broken down into three distinct parts. A reasonable interpretation of this indemnity agreement results in the conclusion that it intended to and does indemnify C & K, even in light of this court's finding of C & K's own liability on the basis that violations of the safety rules constituted negligence *per se,* resulting in the injuries to and deaths to the persons involved, thereby imposing strict liability on C & K. It also indemnifies C & K for the damage to the CARRYBACK. However, with respect to the damages to the platform and for damages occasioned by the oil washing onto the

beaches, the indemnity agreement is less broad. As to such damage the indemnity agreement reads as follows: "DEI shall be liable for any injury to . . . third persons, or the public, or their property, caused by any negligent action or omission of DEI or its servants, agents or employees." With reference to this part of the indemnity agreement, it is for all practical purposes identical to that contained in City of Beaumont v. Graham, 441 S.W.2d 829 (Tex. 1969). There the Texas Supreme Court held:

> "We believe the . . . provisions quoted from the contract . . . properly interpreted . . . were only intended to indemnify the contractee-City against damages or claims resulting solely from acts or conduct of Texas Tower. The provision . . . stipulates that indemnity is to be against claims for injuries or damages sustained *'on account of any negligent act or fault of* CONTRACTOR * * *' . . . . The provision . . . limits the contractor's indemnification obligation to claims and damages 'arising out of *his acts* in connection with the construction of the said improvements, or *occasioned by said contractor,* his agents, servants, or employees.' We agree with the conclusion of the court of civil appeals that the language used in the instant contract does not evidence an intention of the parties that Texas Tower should indemnify City for the consequences of its own negligent conduct, or for the consequences of the joint negligence of the parties, or for the consequences of the negligent conduct of City and the non-negligent conduct of Texas Tower. Cf. Humble Oil & Ref. Co. v. Wilson, 339 S.W.2d 954 (Tex. Civ. App.—Waco, 1960, writ ref'd, n.r.e.); Westinghouse Electric Corp. v. Childs-Bellows, 352 S.W.2d 806 (Tex. Civ. App.—Ft. Worth, 1962, writ ref'd)."

DEI must also respond for the subcontractor indemnity clause because it breached its contractual agreement with

C & K by not complying with the requirement of obtaining an indemnity agreement from the subcontractor, Chapman. The duty established by the contract reads as follows:

> "In the event DEI engages any subcontractor for work on the above-described facilities, DEI shall obtain a written agreement with such sub-contractor by which such sub-contractor shall agree to be responsible for, and to indemnify Zapata-C & K against, any and all liability for injuries and damage to such sub-contractor and its employees and agents, incident to or resulting from the operations of, or services performed by, such sub-contractor on said facilities."

INDEMNITY BETWEEN JOINT TORTFEASORS

The inapplicability of any indemnity recovery between DEI and Chapman brings the theory of contribution into play between these parties as well as C & K. Hodges, Contribution and Indemnity Among Tortfeasors, 26 Texas L. Rev. 150 (1947). The applicable Texas state statute is Vernon's Tex. Rev. Civ. Stat. Ann. art. 2212 (1925):

> "Any person against whom, with one or more others, a judgment is rendered in any suit on an action arising out of, or based on tort, except in causes wherein the right of contribution or of indemnity, or of recovery, over, by and between the defendants is given by statute or exists under the common law, shall, upon payment of said judgment, have a right of action against his co-defendant or co-defendants and may recover from each a sum equal to the proportion of all of the defendants named in said judgment rendered to the whole amount of said judgment. If any of said persons co-defendant be insolvent, then recovery may be had in proportion as such defendant or defendants are

not insolvent; and the right of recovery over against such insolvent defendant or defendants in judgment shall exist in favor of each defendant in judgment in proportion as he has been caused to pay by reason of such insolvency."

The test for determining the right of one tortfeasor to recover indemnity from a co-tortfeasor was stated by the Texas Supreme Court in Austin Road Co. v. Pope, 147 Tex. 430, 435, 216 S.W.2d 563, 565 (1949), as follows:

"In order to determine whether the loss should be shifted from one tortfeasor to another the proper approach is to consider the one seeking indemnity as though he were a plaintiff suing the other in tort, and then determine whether such a one as plaintiff, though guilty of a wrong against a third person, is nevertheless entitled to recover against his co-tortfeasor. * * *

"Consequently, as between themselves, either tortfeasor here involved may recover full indemnity against his co-tortfeasor if it appears that he has violated no duty toward him. On the contrary, if the tortfeasors are in pari delicto, the statute requires that each must bear his proportionate part of the burden." [citing cases]

See also Brown & Root, Inc. v. United States, 198 F.2d 138 (5 Cir. 1952); Humble Oil & Refining Co. v. Martin, 148 Tex. 175, 222 S.W.2d 995 (1949); Strakos v. Gehring, 360 S.W.2d 787 (Tex. 1962); Gulf, Colorado & Santa Fe Ry. Co. v. Bliss, 368 S.W.2d 594 (Tex. 1963). Since DEI and Chapman violated duties owed to each other, another part of the *Austin Road Co., supra,* opinion becomes instructive:

"The negligent conduct of each was a proximate cause of the collision and the injury inflicted was by their joint and concerted action. The act of neither was the sole proximate cause. Both tortfeasors were present on the scene, either in person or by representatives, and each participated in the wrong. Either one or both might have prevented the wrong. Neither did. Each owed the other the same due care, and each owed the duty to exercise ordinary care for the safety of the injured party. Both violated these duties. Consequently, each was guilty of the same quality of negligence toward the injured workman. Thus they stand in pari delicto with each other and must, under the statute, share equally the burdens arising from their wrongful conduct. Texas Power & Light Co. v. Stone, Tex. Civ. App., 84 S.W.2d 738, writ refused; Dallas Ry. & Terminal Co. v. Harmon, Tex. Civ. App., 200 S.W.2d 854, writ refused." 216 S.W. 2d 563 at 565, 566.

[20] DEI and Chapman each violated duties owed to each other, e. g., the failure to properly supervise and DEI's failure to warn of danger. Hence, article 2212 should be applied to the present case. Borg Warner Corp. v. White Motor Co., 344 F.2d 412 (5th Cir. 1965). C & K, DEI, and Chapman shall share in damages equally for injuries or deaths on the platform with DEI contractually indemnifying C & K. Chapman will not be indemnified. Chapman will not be held to owe a share of any recoveries awarded to any of its own employees. The only exception will be in regard to Mr. Monk's damages which will be discussed below.

GASPARD'S CONTRIBUTORY NEGLIGENCE

[21] The evidence is conclusive that the welder, Mr. Gaspard, struck the fatal arc. It is argued that Gaspard

did or had reason to know of the explosive nature of the contents of the tanks. This court repects this contention and instead concludes that Gaspard reasonably believed the tanks were safe because welding had been done on the drip pans at the base of the tanks in his presence; his immediate supervisor, the tool pusher Scanlan, had directed him to weld in place on the lines; and Gaspard had not received adequate warning as to the content of the tanks. This is in accord with Texas case law. In Heldenfels v. Montgomery, 157 S.W.2d 998 (Tex. Civ. App.—San Antonio 1942, writ dismissed), the plaintiff had received through defendant's employees the idea that the piston he was working on was safe because of its solidarity. In actuality, the piston was hollow and exploded when the plaintiff, an experienced machinist, welded on it. This court accepts this as the appropriate adoptive "federal" law to apply in this case by way of section 4(a) (2) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a) which adopted the adjacent state law as of August 7, 1953. It cannot be said that as matter of law in Texas, Gaspard was contributorily negligent in relying upon the orders of Scanlan and the indications that the tanks were safe, although Gaspard may have realized at the time that if the tanks were loaded with oil he would be doing an extremely dangerous act subjecting himself and others to injury. The suggestion was made several times in the course of this trial that Gaspard as a reasonable welder should have checked the contents of the tanks by smelling the lines himself. Failure to check the tanks himself did not constitute contributory negligence in light of the fact that many of the crew members had been told and relied on the information that the tanks were safe. Dickerson v. Continental Oil Co., 449 F.2d 1209 (5th

Cir. 1971). It is undisputed that while the platform, at the time of the accident, had five oil storage tanks and related separation equipment no wells were connected to those tanks or into that equipment. On the contrary, the three wellheads visible were shut-in and disconnected, except for bleeding of gas from one well to supply pressure for the air tugger. While the Hydrotech men who were performing the same work as the Chapman people, before they lost their contract and Chapman was hired, may have had the knowledge that there was some oil in at least one tank, there is no reason, without evidence of an adequate warning, to impute that knowledge to Gaspard. Accordingly, Mr. Gaspard will not be barred from recovery.

Admiralty law will be applied to decide the remainder of the questions at issue.

HIRE OF THE VESSEL

[22] Mr. Williams, President of DEI and acting as an agent for C & K, telephoned Mr. Eddie Dyer, President of Dearborn Marine, to arrange for the daily transportation of the men to the platform. In the opinion of this court, the agreement reached in that conversation must be held to be an arrangement for the daily hire of a vessel to transport passengers, namely, the employees of C & K, DEI, and Chapman, sounding in contract and not a demise of the vessel to C & K. *See* Reed v. United States, 78 U.S. 591, 11 Wall. 591, 20 L.Ed. 220 (1870). Dearborn Marine agreed to carry workmen to the C & K platform on one of their boats. The fact that the boat itself, the CARRYBACK, was not chartered is evidenced by the fact that the M/V PICTEN had a few days before the casualty been the boat in use to transport the men. The boat was not operated, controlled, or manned by

C & K or its agents, DEI. Mr. Williams' agreement, which was never reduced to writing, with Mr. Dyer also included that the ship be manned by the Dearborn-Thoroughbred group.

As the Dearborn attorney stipulated for the purposes of this lawsuit, and because of the highly dubious nature of the corporate structures of the Dearborn group, all of the corporations, subs and agents of Thoroughbred, et seq., will be considered one corporate entity. Thus, DEI nor C & K had control or management of the CARRYBACK. Accordingly, "[w]hen the vessel is not under demise charter, the owner who is then in control will be liable for damages resulting from negligence in the operation and maintenance of the ship. The vessel, herself, will, of course, be liable in rem." H. Baer, Admiralty Law of the Supreme Court, 2d ed. 317 (1969).

The reasoning behind exposing Dearborn to liability without limitation in the instant case is based upon the just rationale that the firms who supply these boats along the coast for all types of operations and through dummy corporations also man and victual the boats, should not be allowed the luxury of irresponsibility in the manner in which they supply their services. In Re Spencer Kellogg & Sons, 52 F.2d 129 (2nd Cir. 1931). These corporations attempt through an elaborate maze of paperwork to create a bareboat charter thereby avoiding the safety regulations of 46 U.S.C. § 404 and the classification of passengers for hire under 46 U.S.C. § 390(a) (4). *Cf.* United States v. The Reefer King, 90 F.Supp. 236 (W.D. Wash 1950) (distinguishable on its facts). Corporations such as DEI and C & K obviously hire the services of companies like the Dearborn group to supply safe and competent services.

This reliance and duty of care to passengers and public cannot be shifted on the thin weight of paperwork alone.

STATUTORY VIOLATIONS OF THE CARRYBACK

[23] It is undisputed that the 01.s. CARRYBACK was a 137 gross ton, diesel driven motor utility vessel with dimensions of 86x22x10 feet. It is also stipulated that on the day of the casualty Mr. Armstrong, an unlicensed master, was piloting the CARRYBACK with Mr. Cassel as an engineer and Mr. Love aboard as a cook.

The following statute is applicable to this recitation of facts:

> ". . . also be required to be complied with before a certificate of inspection shall be granted, and no such vessel shall be navigated without a licensed engineer and a licensed pilot . . . All vessels of above fifteen gross tons carrying freight for hire and all vessels of above fifteen gross tons and in excess of sixty-five feet in length carrying passengers for hire, but not engaged in fishing as a regular business, propelled by gas fluid, naphtha, or electric motors, shall be subject to all the provisions of this section relating to the inspection of hulls and boilers and requiring engineers and pilots, and for any violation of the provisions of title 52 of the Revised Statutes applicable to such vessels, or of rules or regulations lawfully established thereunder . . ." 46 U.S.C. § 404.

The CARRYBACK meets the criteria of a vessel to be regulated under this statute. Therefore, as a matter of law, the owners and master of the CARRYBACK were in violation of the statute in respect to the absence of a licensed pilot and the failure to have an unexpired certificate of approval on the vessel.

UNSEAWORTHINESS

The liability of the shipowner for the incompetency of the ship's crew has had a colorful and well litigated history. Judge Learned Hand gave an enlightening account of the progression of this area of the law in Keen v. Overseas Tankship Corp., 194 F.2d 515 (2d Cir. 1952), cert. denied, 343 U.S. 966, 72 S.Ct. 1061, 96 L.Ed. 1363 (1952):

> "It has long been settled that the assured's warranty of his ship's seaworthiness in a maritime policy is broken if the master or the crew are not competent for their duties. The King's Bench so held in 1811, Tait v. Levi, 14 East 481 (see also Walker v. Maitland, 5 B. & Ald. 172); the Supreme Court assumed as much in 1828, McLanahan v. Universal Insurance Company, 1 Pet. 170, 183, 7 L.Ed. 98; and the same doctrine lay behind the decision in Draper v. Commercial Insurance Company, 21 N.Y. 378. Moreover, in a suit by cargo against the ship *in rem,* Judge Betts in The Gentleman, Olcott, 110, Fed.Cas.No. 5,324, made one ground of his decree in favor of the libellant that the crew were disabled by fever when the ship broke ground; and, although Mr. Justice Nelson, Fed.Cas.No.5,323, reversed this decree unpon the facts, the whole discussion presupposed that, had the crew been in fact unfit for their duty, Judge Betts would have been right. The Ninth Circuit in Re Pacific Mail S.S. Co., 130 F. 76, 69 L.R.A. 71, held the shipowner liable without limitation for the loss of passengers' lives—and for the loss of life of one member of the crew—because the inability of the officers to communicate with a Chinese crew made the crew itself unfit for their duty and the ship unseaworthy. On the other hand, with the exception of the seaman just mentioned in Re Pacific Mail S. S. Co., supra, as to whom the court

> suggested no distinction, in none of the decisions we have mentioned did a member of the crew recover for personal injuries. In 1903 in the often cited case of The Osceola, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760, the Supreme Court reviewed the law at length relating to an injured seaman's right against the owner; and held that he could not recover from the owner for injuries suffered through the negligence of another seaman, invoking the fellow servant doctrine of the common law; but it recognized that it was otherwise if his injuries arose from the unseaworthiness of the ship."

In *Keen,* a crew member was attacked by another crew member with a meat cleaver and the Second Circuit held that the liability for personnel was identical with that for hull and gear—i.e., in the light of Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944), absolute, nondelegable, and not conditioned on fault or notice. Thereby, they reversed the district court which had instructed the jury that liability depended on whether or not the shipowner knew or ought to have known of the vicious character of the crewman.

The Supreme Court adopted Hand's reasoning in *Keen* in the review of a Fifth Circuit court case, seeming to equate the crew's fitness as a condition of the ship's seaworthiness. Boudoin v. Lykes Bros. Steamship Co., Inc., D.C., 112 F.Supp. 177, 5 Cir., 211 F.2d 618, 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed.2d 354 (1954). The issue there was the ship's liability for one crew member assaulting and injuring another crew member. The court declared that one of the criteria for the warranty of seaworthiness rested on whether or not the member in question made the crew as a whole incompetent to "meet the

contingencies of the voyage." *Boudoin, supra,* 348 U.S. 336, 340, 75 S.Ct. 382, 385, 99 L.Ed.2d 354, 359. The *Boudoin* case assumes that no prior notice of the condition constituting unseaworthiness need be brought home to the shipowner. However in the instant case Dearborn and Thoroughbred knew of the fact that the CARRYBACK itself did not possess the required safety inspection sticker and that Armstrong was not a licensed master thereby making the crew potentially incompetent "to meet the contingencies of the voyage."

[24] Recently, the Supreme Court again addressed itself to the question of unseaworthiness. Mr. Justice Stewart noted that the shipowner is liable for unseaworthiness as a concept wholly divorced from negligence or due care concepts and that it could be transitory. *See* Crumady v. The J. H. Fisser, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413 (1959); Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960). The Fifth Circuit case Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed.2d 562 (1971) involved two longshoremen in a loading operation where a fall was lowered too quickly and the plaintiff was seriously injured. The Supreme Court went on to say the following in its opinion:

> "A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The number of men assigned to perform a shipboard task might be insufficient. The method of loading her cargo, or the manner of its stowage, might be improper. For any of these reasons, or others, a vessel might not be reasonably fit for her intended service." 400 U.S. 499, 91 S.Ct. 517-518.

However, the court held there was no unseaworthy condition in *Usner* summarizing in the following manner:

> "In Trawler Racer, supra, there existed a condition of unseaworthiness, and we held it was error to require a finding of negligent conduct in order to hold the shipowner liable. The case before us presents the other side of the same coin. For it would be equally erroneous here, where no condition of unseaworthiness existed, to hold the shipowner liable for a third party's single and wholly unforeseeable act of negligence." 400 U.S. 500, 91 S.Ct. 518.

[25] Unlike the facts in *Usner,* the unseaworthy condition of the CARRYBACK was not the result of an unforeseeable negligent act of a longshoreman or third party. To the contrary, under the umbrella of the reasoning stated in *Usner, supra,* and the recent Fifth Circuit extension of that philosophy in Robinson v. Showa Kaiun K.K., 451 F.2d 688 (5th Cir. 1971), the owners of the CARRYBACK must be held liable. *Robinson, supra,* developed the theory that a "congeries" of conditions by third parties (somewhat analogous to Freeport Operators furnishing an unlicensed crew) can create an unseaworthy vessel. For even if the fire on the ship, the CARRYBACK, itself did not create an "instantaneous unseaworthy" condition, the method in which the boat was moored under the circumstances of the obvious extremely deteriorated state of the platform created an unseaworthy or dangerous condition for which the shipowners must bear the burden of placing a master in charge who did not have the competence to know to moor the boat further out from the platform. The master knew or must, in law, be charged with knowing that the platform was a deteriorated oil storage platform and that welding was being done on the platform, for he carried the equipment for the welding operations

to the platform on his boat. Mr. Armstrong, the master, knew or should have known of the hazardous proximity of his boat to potential fires and possible explosion by the fact that he had, at an earlier date, helped to put out a fire on this platform during these repair operations. The positioning of any standby vessel varies with the particular circumstances, and no one specific safe practice would apparently apply in all cases. However, insofar as this court can determine, this is the first instance in which a standby vessel has been burned in an offshore platform explosion and fire catastrophe.

[26] The fact that neither C & K nor DEI requested a mooring buoy to be installed at a safe distance from the platform does not exonerate the shipowners from failure to make such a request. The master of the CARRYBACK was supposedly the "expert" on the scene in where and how his boat should be moored. If the circumstances warranted, the master should have requested or recommended the need for a mooring buoy. The failure of the master to have the CARRYBACK moored in a position clear of the platform when not in the immediate act of picking up a workman from the platform is, as a matter of law, negligent and incompetent and was a direct cause of the crew and Monk's death. At the time of the explosion, the CARRYBACK was not in the process of taking aboard a workman. All of this is not to mention the obvious statutory insufficiency of the crew according to 46 U.S.C. § 404 and, therefore, blatant unseaworthiness of the ship. Consequently, with regard to the claims of the crewmen, the CARRYBACK was unseaworthy.

BURDEN OF PROOF

[27] Under the Pennsylvania Rule, the owner of the CARRYBACK has the burden of proving that the statu-

tory violations of the CARRYBACK could not have been a cause of the casualty. The Pennsylvania v. Troop, 86 U.S. 125, 19 Wall. 125, 22 L.Ed. 148 (1873). This Rule is not diminished in its application to this case by the Fifth Circuit's holding in Compania De Maderas De Caibarien, S. A. v. The Queenston Heights, 220 F.2d 120 (5th Cir. 1955). In *The Queenston,* the violation by the one ship was so slight that justice could not require a strict application of the Pennsylvania Rule. However, in the case at bar there was more than one minor infraction, thus the "Rule" is appropriate. The CARRYBACK and her owners have failed to meet this standard of proof that the statutory violation could not have had any causal relation to the death of the men aboard the vessel. *See* Manning v. M/V "Sea Road", 417 F.2d 603 (5th Cir. 1969).

MONK'S RECOVERY

[28] Mr. Monk was not a crew member or one doing the traditional work of a seaman when he was aboard the CARRYBACK at the time of the explosion, fire, and his ensuing death. It may be assumed that he was on the CARRYBACK using the phone and other facilities provided there for the convenience of his work as supervisor of the platform. Accordingly, the shipowner owed Mr. Monk the duty of exercising reasonable care without any encumbrances or distinctions drawn as to the nature of his "common law status" on the boat, i. e., business invitee or licensee. The Supreme Court commented on this issue in Kermarec v. Transatlantique, 358 U.S. 625, 630, 79 S.Ct. 406, 409, 3 L.Ed.2d 550 (1959):

> "It is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable

care towards those lawfully aboard the vessel who are not members of the crew. Leathers v. Blessing, 105 U.S. 626, 26 L.Ed. 1192; The Max Morris, 137 U.S. 1, 11 S.Ct. 29, 34 L.Ed. 586; The Admiral Peoples, 295 U.S. 649, 55 S.Ct. 885, 79 L.Ed. 1633. But this Court has never determined whether a different and lower standard of care is demanded if the ship's visitor is a person to whom the label 'licensee' can be attached. The issue must be decided in the performance of the Court's function in declaring the general maritime law, free from inappropriate commonlaw concepts. The Lottawanna (Rodd v. Heartt) (U.S.) 21 Wall, 558, 22 L.Ed. 654; The Max Morris (U.S.) supra. * * * We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." 358 U.S. 632, 79 S.Ct. 410, 3 L.Ed.2d 554, 555.

A California district court elaborated on the *Kermarec* language in a case involving the ship's duty of care to a stevedore and developed the argument of duty to a business invitee in the following way:

> "It is, of course, true that an occupier of premises, including a charterer in possession of a vessel, owes certain duties of care to a business invitee, especially to an independent contractor, such as a stevedore company, which comes onto the premises to perform services, 2 Harper & James, The Law of Torts, Section 27.12 (1956), including the duty not to cause injury by negligent activity, 2 Restatement of Torts, Section 341; the duty to warn of latent perils actually known to the occupier, Prosser on Torts, 453 (1955); and the duty to inspect the premises to discover dangerous conditions. 2 Restatement of Torts, Section 343. See generally, Prosser, supra, 452-62. . . . The duty arises, not from the law of contract, but from the law of tort. It rests upon the general obligation of persons to use ordinary care, and is violated only by negligent conduct . . ." Mickle v. The Henriette Wilhelmine Shulte, 188 F. Supp. 77, 80 (N.D.Cal.1960)."

Under the theory that C & K through its agent had negotiated with Dearborn for a contract for hire of a boat to carry passengers, as this opinion discussed earlier, the Dearborn group, as owner *pro hac vice* (this term is used here because the CARRYBACK was chartered by one of the splitter Dearborn operations from the "owner" which was another splitter Dearborn operation) is held responsible for a "reasonable man" duty of care to persons on the boat. A similar conclusion would also result if the premise were fashioned that the agreement between C & K and Dearborn was a charter of the boat to C & K.

[29] Even applying the theory that the agreement for the CARRYBACK was a charter, the owner of the vessel or the owner *pro hac vice* (not the charterer who is not in control of the vessel) is responsible for the negligence in the navigation of the vessel. Since this hypothetical charter of the CARRYBACK would have been informal and oral, this court would have to look to standard charter agreements to determine the usual allocation of duties and responsibilities. For example, in reviewing the Government Form New York Produce Exchange time charter, appendix D, p. 287, Poor, Charter Parties and Ocean Bills of Lading (4th Ed. 1954), the text discusses the obligations of the charterer to provide and pay for such things as pilotage, towage, bunker, etc.; however, even though a pilot is provided by the charterer "nevertheless it is the owner and not the charterer who is liable for his negligence in navigating." Poor, *supra* at § 7,

pp. 22, 25. *See also* Delta Engineering Corp. v. Scott, 322 F.2d 11 (5th Cir. 1963).

[30] As discussed above, Mr. Armstrong's mooring of the boat just prior to the accident and positioning it where he did at the time of the accident was negligent and a cause in whole or in part of the deaths of the crew members and Mr. Monk. Mr. Armstrong's negligence is imputed to the shipowners and Mr. Armstrong's employer, the Dearborn group.

[31, 32] Mr. Monk's own negligence in his failure to more adequately supervise the welding on the platform will not bar his recovery of damages. *Delta Engineering, supra.* The harsh common law contributory negligence rule of barring recovery is wholly incompatible with admiralty law. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409, 74 S.Ct. 202, 98 L.Ed. 143 (1953). In the historic application of comparative negligence Mr. Monk's recovery will be reduced by 25% of the total amount of damages.

[33] Based on the findings of fact and conclusions of law discussed earlier in this opinion, C & K, Chapman, and the Dearborn group are held jointly and severally liable for Mr. Monk's death.

CONTRIBUTION AMONG ALL DEFENDANTS FOR THE DAMAGES OF MONK AND THE CREW MEMBERS

[34] As to the three crew members Armstrong, Love, and Cassel, all the defendants C & K, DEI, Chapman, and the Dearborn group stand liable in whole or in part for the explosion, fire or unseaworthy condition of the CARRYBACK (Dearborn's duty) resulting in the death

of these three plaintiffs and consequently each will share a 25% burden of the recovery awarded to each of the crew members. Penn Tanker Co. v. United States, 310 F.Supp. 613 (S. D. Tex. 1970). Because of the assignment of their cause of action executed by the heirs of Messrs. Armstrong, Love, and Cassel in favor of C & K and DEI, these two defendants will stand in the shoes of those heirs. As a result of these plaintiffs having a right to sue all the named defendants and so doing, the sharing of liability by all responsible parties as here outlined is fair and equitable without any holding on the issue of contribution among these parties. This result is in perfect accord with the Supreme Court's holding in Halcyon Lines v. Haenn Ship C. & R. Corp., 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed. 318 (1951), as well as falling within the philosophy of the exception carved out of the no contribution in noncollision cases rule announced by the Fifth Circuit in Horton & Horton, Inc. v. T./S. J. E. Dyer, 428 F.2d 1131 (1970), cert. den., Horton & Horton v. Vaughan Marine, 400 U.S. 993, 91 S.Ct. 461, 27 L.Ed. 2nd 441 (1971). *Contra,* In Re Standard Oil Co. of Cal. 325 F.Supp. 388 (N.D.Cal.1971).

[35] Since there was not a demise of the vessel, there is no basis for indemnity nor contribution for the proportionate damages in favor of the shipowner, Dearborn, against C. & K. D/S Ove Skou v. Hebert, 365 F.2d 341 (5th Cir. 1966).

[36] Under the authority of Tri-State Oil Tool Indus., Inc. v. Delta Marine Drilling Co., 410 F.2d 178, 186—187 (5th Cir. 1969), one tortfeasor may recover indemnity from another depending upon the nature of the negligence of each. As Judge Ainsworth ably put it in *Tri-State, supra* at 181:

"In 41 Am.Jr.2d § 20, under the caption 'Right to Indemnity of Persons Compelled to Pay for Another's Wrong,' the following is a general statement of the applicable law:

> " 'Although the proposition that there can be no indemnity between joint tortfeasors is still recognized as a broad general rule, it has been said that the rule which prevents a tortfeasor from recovering from a joint tortfeasor must be viewed in light of the vast growth of negligence law which has markedly changed the characteristics of negligence actions so that legal negligence no longer embodies a concept of misbehavior, and has forced the courts to find a way to do justice within the law so that one guilty of an active or affirmative act of negligence will not escape liability, while another whose fault was only technical or passive assumes complete liability. It has been said that the right of indemnity depends on the principle that everyone is responsible for the consequences of his own wrong, and if others are compelled to pay damages that ought to have been paid by the wrongdoer, they may recover from him. In this connection it has been observed that where one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage, the rule denying contribution or indemnity between joint tortfeasors does not apply, the parties not being in pari delicto as to each other, although either may be held liable as to third persons. A right to implied indemnity among tortfeasors may arise out of a contractual or special relationship between the parties or from equitable considerations. Accordingly, it is generally held that a person who, without fault on his own part, has compelled to pay damages is entitled to recover indemnity where as between the parties to the indemnity action, the defendant is primarily liable while the plaintiff is only secondarily liable—that is, where the plaintiff is only technically or constructively liable to the injured party, or where his liability was based on a legal or contractual relationship with the defendant. In other words, a joint tortfeasor may recover indemnity where he has only an imputed or vicarious liability for damages caused by the other tortfeasor.' "

[37, 38] On the facts of the case at bar, while the court concludes that C & K is liable for its failure to comply with the requisite federal safety regulations, such failure did not constitute active negligence, and in the well service agreement dated December 1, 1968, DEI contracted to follow United States Coast Guard and United States Land Management regulations and to perform their job in a workmanlike manner. Since C & K was not actively negligent and had contracted with DEI to carry out C & K's responsibilities relating to these matters, C & K is entitled to indemnity contractually and on common law principles from DEI to the extent C & K has been held liable herein to the various death and personal injury claimants. Likewise, on the facts of the case at bar DEI is primarily liable and negligent for the conduct of Messrs. Monk and Chenier in their failure to adequately supervise the platform operations; Chapman is primarily liable and negligent for Mr. Overly's and Mr. Scanlan's failure to supervise the welding work; Dearborn is primarily liable and negligent for the furnishing of an unseaworthy vessel and the negligence of its master in improperly mooring the vessel. Therefore, no indemnity arising in tort will be allowed as between these three defendants. As previously stated, C & K is awarded indemnity on common law principles as well as in connec-

tion with its contract with DEI and, accordingly, DEI will indemnify C & K for its 25% of the damages due the crew members.

[39, 40] As to the death of Mr. Monk, only Chapman, Dearborn, and C & K were sued, and, thus, Mr. Monk's recovery will be apportioned 33 1/3% to each of these three defendants. This holding is consonant with the decision in *Horton, supra,* and *Halcyon, supra,* because Mr. Monk unlike the insured party in Halcyon, was not precluded from suing and did sue Chapman, C & K, and the Dearborn group. Therefore, apportioning of the damages among these three defendants is appropriate. Mr. Monk, having received Longshoreman & Harborworker Compensation benefits, is precluded from directly suing DEI. Issues involving Mr. Monk's state compensation claims need not be resolved here. Bagrowski v. American Export Isbrandtsen Lines, Inc., 440 F.2d 502 (7th Cir. 1970).

As to the indemnity questions raised between these three joint tortfeasors (i.e., C & K, Chapman, and Dearborn), a more complex issue is presented. Again, it would ill-behoove this court to factually conclude that any one of the defendants' negligence was any the less primary than any other joint tortfeasor's; therefore, no indemnity arising in tort will be allowed with the exception of Armstrong's recovery. *See* p. 1253 of this opinion.

[41] DEI's contractual indemnity agreeing to ". . . indemnify and hold ZAPATA-C & K harmless against any and all liability for injuries and damage to DEI and its agents and employees," will again provide the basis for DEI's indemnification of C & K. Even Justice Black's dissent in *Ryan,* 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133,

infra, makes it clear that such an indemnity is not violative of the protective philosophy for employers written into the Longshoremen's Act:

> "I agree, of course, that if the employer here had made a contract, oral or written, agreeing to hold this shipowner harmless or to indemnify the shipowner against liability for injuries to petitioner's employees caused by the shipowner's negligence in whole or in part, the contract would have been valid and indemnity could have been obtained. For the Longshoremen's Act does not forbid employers under it to make independent agreements to indemnify others." 350 U.S. 141, 76 S.Ct. 241.

[42-47] Now the question arises if, on a tort indemnity theory, Dearborn should be held to indemnify DEI's indemnification of C & K for Mr. Monk's recovery. Since DEI cannot have Mr. Monk's negligence imputed to it for the purposes of determining negligence of the parties in a tort theory of indemnity, DEI's only negligence was in Mr. Chenier's failure to more adequately supervise, which would have to be and is held as secondary negligence in comparison with Dearborn's activities in causing Mr. Monk's death. The Fifth Circuit has held that the negligence of an injured employee may not be imputed to his employer so as to render the employer liable in indemnity for the injuries sustained by the employee. Drewery v. Daspit Bros. Marine Divers, Inc., 317 F.2d 425 (5th Cir. 1963); Loffland Bros. Co. v. Roberts, 386 F.2d 540 (5th Cir. 1967). Therefore, under this theory of primary and secondary negligence expounded in *Tri-State, supra,* DEI would not be held to indemnify Dearborn for Mr. Monk's death; however, since DEI is held to contractually indemnify C & K, it seems only just that Dearborn be held to indemnify DEI on a tort theory.

In the alternative, Dearborn should be held to ultimately indemnify C & K for Mr. Monk's recovery on a theory of owing the duty of a warranty of workmanlike performance. A review of recent case law convinces this court that the spirit, if not the letter, of the *Ryan* doctrine would support, in this novel set of facts, an implied warranty of workmanlike performance from Dearborn owed to C & K as the party contracting the boat on a passenger-for-hire basis, through its agent, DEI. Ryan Stevedoring Co., Inc. v. Pan-Atlantic S. S. Corp., 349 U.S. 901, 75 S.Ct. 575, 99 L.Ed. 1239 (1955). This court recognizes the factual distinctions in the stevedore/shipowner indemnity cases, but still holds that the equity of the doctrine should be boldly extended to other types of cases. The trend of case dicta would support such an extension. *See* Whisenant v. Brewster-Bartle Co., 446 F.2d 394 (5th Cir. 1971); Grigsby v. Coastal Marine Service of Texas, Inc., 412 F. 2d 1011 (5th Cir. 1969); Bue, Admiralty Law in the Fifth Circuit—A Compendium for Practitioners: 1, 4 Hous. L. Rev. 347, 410, et seq. (1966). *Whisenant, supra,* is a case based on a fact situation very similar to the instant case. A contractor, Loomis, had contracted to perform services on a submersible barge (a vessel) owned by Brewster-Bartle pursuant to a drilling contract with Texaco, Inc. On appeal, Loomis argued the trial court had erred in expanding the *Ryan* doctrine citing the past reluctance of the court in *Loffland, supra.* But this time the appellate court agreed with the trial court, stating:

> "Notwithstanding these general admonitions we are convinced that the doctrine was properly analyzed in this case. The court found that (1) in contracting to perform services beneficial to the vessel, Loomis warranted to perform in a workmanlike manner; (2) Loomis' unsafe procedure and plan for 'rigging up' the vessel rendered it unseaworthy and proximately caused Whisenant's [employee of Loomis] death; (3) in rendering the vesel unseaworthy Loomis breached its implied warranty of workmanlike services and was therefore obligated under *Ryan* to indemnify the barge owner for any damages sustained as a result. Thus, given the implied warranty of workmanlike service owed by the special contractor (Loomis) to the drilling barge, we fail to see, on the facts now before us, any reason to treat the scope and measure of recovery for its breach in a manner conceptually different from that applied to the warranty of workmanlike performance owed by the stevedore to the vessel owner in *Ryan* and Crumady v. Joachim Hendrik Fisser. Both the submersible barge owner (Brewster-Bartle) in the case at hand and the vessel owner in *Ryan* relinquished control of their vessel to the tortfeasor; yet in each case they remained absolutely liable for the condition of their vessel under the nondelegable duty to provide a seaworthy vessel. In both cases, therefore, we think it appropriate that the party whose fault caused the injury should be held responsible to indemnify the party compelled to pay an injured claimant because of its technical or vicarious liability." Whisenant, 446 F.2d at 400 (reversed and remanded on other grounds).

This warranty established a duty on the part of Dearborn to furnish a seaworthy vessel to C & K and all the third party beneficiaries of the contract for hire including Mr. Monk and to position such a seaworthy vessel in a safe location with regard to the platform during the performance of the work on the platform for the duration of the contract. Dearborn did not follow through with this implied warranty and as a direct result caused Mr. Monk's death. As well as being a cause, in whole or in part, of the crew members' deaths, this breach of warranty of fur-

nishing a seaworthy vessel and locating it in a safe position would entitle C & K to indemnity from Dearborn. Clearly, there is as between the charterer (or contracting party here) and the shipowner a warranty of seaworthiness owed to the charterer. D/S Ove Skou v. Hebert, *supra,* 365 F.2d at 352. This court holds that the language about third-party beneficiaries not being established as to independent contractors by contracts between well owners or lessees and other independent contractors in *Loffland, supra,* 386 F.2d at 549 is distinguishable on its facts and not controlling here.

This indemnification sounds in contract rather than tort and does not require, although it was so held, a finding of negligence on the part of Dearborn:

> "Where the shipowner is liable to the employees of the stevedore company as well as its employees for failing to supply a vessel and equipment free of defects, regardless of negligence, we do not think it unfair or unwise to require the stevedore to indemnify the shipowner for damages sustained as a result of injury-producing defective equipment supplied by a stevedore in furtherance of its contractual obligations. * * * we deal here with a suit for indemnification based upon a maritime contract, governed by federal law, American Stevedores, Inc. v. Porello [, 330 U.S. 446, 67 S.Ct. 847, 91 L.Ed. 1011,] supra, in an area where rather special rules governing the obligations and liability of shipowners prevail, rules that are designed to minimize the hazards encountered by seamen for the accidents that inevitably occur, and to minimize the likelihood of such accidents. By placing the burden ultimately on the company whose default caused the injury, Reed v. The Yaka, 373 U.S. 410, 414, 83 S.Ct. 1349, 10 L.Ed.2d 448. 452, we think our decision today is in furtherance of these objectives." Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, 84 S.Ct. 748, 11 L.Ed.2d 732.

These objectives are also met in the instant case even though Mr. Monk, unlike the other crew members, was not a seaman in the traditional sense.

C & K's own statutory liability for the platform's condition and ultimately the explosion and death of Mr. Monk is not within the preclusions of Weyerhaeuser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed.2d 491 (1958). *Weyerhaeuser* was a case involving a shipowner and stevedore company indemnity question. The case was remanded for a new trial for the jury to determine the exact nature of the shipowner's negligence, which would ultimately determine if the shipowner's own negligence would preclude him from recovery under his indemnity action against the stevedore company.

PROPERTY DAMAGES

[48] With respect to C & K's property damage claims against DEI and Chapman, C & K with the approval of DEI settled its claim against Chapman and that part of C & K's suit was dismissed. However, as to the remaining issues in this suit against DEI, the contractual arrangement between these two companies must be honored. In this respect DEI contractually assumed the obligation and responsibility to perform all the work necessary on the platform and must be held liable for such damages and expenses. C & K's negligence in failing to comply with the safety regulations does not constitute any breach of duty that C & K owed to DEI because DEI contractually assumed this responsibility as between C & K and DEI. C & K owed no duty in this respect to DEI and C & K's

negligence as discussed above does not constitute a bar to a recovery by C & K against DEI for property damage to the platform and expenses incident to cleaning the beaches. Of course, C & K must give credit on such damages to the extent C & K receives any payment from the amount agreed to be paid by Chapman in settlement of property damage claims as between C & K and Chapman.

[49] As to the Dearborn group's claim for property damage to the vessel, the CARRYBACK (stipulated to be $129,500) all the defendants, C & K, DEI, Chapman, and the Dearborn group itself, were responsible, as discussed above, for the chain of events and conditions that brought about the explosion, fire, and ultimate destruction of the vessel. Using a liberal application of the admiralty doctrine of comparative negligence, the Dearborn group will have its property damage recovery reduced by 25%. Since Dearborn could and did sue all the other defendants, C & K, DEI, and Chapman will all share equally in the payment of property damages to Dearborn after the 25% reduction is made from the total recovery. *See generally, Horton, supra.* Dearborn must give credit on such damages to the extent Dearborn receives any payment from the amount agreed to be paid by Chapman in settlement of all property damage claims against it.

[50] Because DEI breached the contractual agreement to obtain written indemnity agreements from all subcontractors, DEI must bear C & K's portion of the damages recoverable to Dearborn for the destruction of the CARRYBACK.

[51, 52] As previously discussed, this catastrophe brought about the death of Captain Armstrong, CARRYBACK crew members Cassel and Love, Chapman em-

ployee welder Mr. Gaspard, and DEI Supervisor Mr. Monk. The evidence reflects that Captain Armstrong's body was recovered in the sea; that Mr. Cassel's body was found in his bunk aboard the CARRYBACK; that Mr. Love's body was never found; and that the remains which were identified as those of Mr. Monk were found on the foredeck of the CARRYBACK. A careful review of the evidence relating to this catastrophe causes this court to conclude that Captain Armstrong more than likely lived long enough to jump overboard in an attempt to save himself, and, consequently, there was some period of time in the neighborhood of five to fifteen minutes during which Captain Armstrong lived and suffered extreme conscious pain and suffering. The court has concluded that an award of $25,000 to the estate and heirs of Captain Armstrong for conscious pain and suffering would be appropriate. At the same time, the court must conclude for the reasons heretofore stated that Captain Armstrong was himself guilty of acts of negligence that were a cause in whole or in part of his death and the deaths of the others aboard the CARRYBACK and the damages to the CARRYBACK. Therefore, the total sum for pain and suffering plus the recovery established in the pretrial settlement awarded to the estate and heirs of Captain Armstrong for his death should be reduced by 25% because of such negligence. With respect to the liability for the amount of recovery by the estate and heirs of Captain Armstrong, Dearborn will be indemnified equally by Chapman, DEI, and C & K, with DEI indemnifying C & K for C & K's portion of any such amount. This is for the reason that with respect to the cause of Captain Armstrong's death his negligence was passive as compared to that of C & K, DEI, and Chapman. *See* page 1250 of this Memorandum and Order for a dis-

cussion of not imputing Armstrong's negligence to Dearborn on an indemnity issue.

[53] Inasmuch as Mr. Love's body was never found, this court has no alternative but to conclude that he died instantaneously and, therefore, no award will be made for any conscious pain and suffering relating to Mr. Love.

As stated above, Mr. Cassel's body was found in his bunk, and this fact leads this court to conclude that Mr. Cassel died instantaneously, more than likely through suffocation. Accordingly, no recovery will be allowed to the estate and heirs of Cassel for any conscious pain and suffering.

[54] Only a portion of Mr. Gaspard's body was found, and considering the fact that it was his actions in striking an arc in attempting to weld the equalizer line which set off the initial explosion, this court concludes that he was killed instantaneously and, consequently, no award will be made to the estate and heirs of Mr. Gaspard for conscious pain and suffering.

[55] The location of the remains which have been identified as those belonging to Mr. Monk leads this court to believe that Mr. Monk more than likely lived between five and fifteen minutes during which period of time he suffered extreme conscious pain and suffering in attempting to escape the fire aboard the CARRYBACK. The court awards to the estate and heirs of Mr. Monk for such conscious pain and suffering the sum of $25,000. As previously pointed out, the court has concluded that Mr. Monk was himself guilty of negligence and, consequently, the amount awarded to the estate and heirs of Mr. Monk will be reduced by 25% because of his own negligent conduct.

The exact amount of recovery by each party before this court is set out in a judgment which will be prepared by the attorneys and submitted to the court for approval and entry.

As to those actions which were filed in Louisiana and consolidated in this court for trial on the liability issues, they will be remanded to the court in which they were originally filed for an assessment of damages to be recovered by the parties to those actions.

With respect to C & K's claim for damages to the platform and expenses incurred relating to cleaning the beaches, the parties have stipulated that such damages and expenses total $285,000.

Black Equipment & Supply, Inc., had some equipment on the platform that was destroyed; the parties have stipulated that the facts relating to Black can be determined in this suit at this time. The parties have agreed that the total value of the equipment lost by Black Equipment & Supply, Inc., was $31,472.62.

Hydrotech Company, the company that Chapman replaced in connection with the work on the platform, has a claim, stipulated to be $4,789.93, for property damage.

[56] For the reasons stated in this Memorandum and Order, C & K, DEI, and Chapman will be liable and responsible for damages suffered by Black Equipment & Supply, Inc., and Hydrotech Company. DEI will indemnify C & K for C & K's portion of such damages and both C & K and DEI giving credit in connection with such recovery to any amounts they receive out of the amount contributed by Chapman in settlement of C & K's suit against Chapman.

With respect to C & K's damages to the platform and the expenses incurred in cleaning the beaches for the reasons stated in this Memorandum and Order, DEI will be liable and responsible to C & K for such damages.

All other causes of action with concomitant pleas for contribution and/or indemnity are denied for failure to prove a duty owed to the party seeking contribution and/or indemnity coupled with freedom from negligence.

C & K will pay the fees (stipulated to be $10,738.82) established by the oral contract with Dearborn for the services of the boat and crew for the period they were actually used.

C & K will pay the $7,313.25 established as the payment owing to Chapman for services rendered to the date of the explosion. The application of Texas contributory negligence law will prevent Chapman from recovering the $6,642.17 for loss and damage to its tools on the platform.

All parties will pay their own costs and attorney's fees.

The attorneys for C & K are directed to prepare and have same approved by all other attorneys a comprehensive judgment in accordance with this Memorandum and Order which shall constitute this court's findings of fact and conclusions of law. Such comprehensive judgment shall be presented to the court for approval and entry on or before two weeks from this date.

APPENDIX I

Written Well Service Agreement of December 1, 1968, Between C & K and DEI:

"VIII.

DEI agrees to indemnify and hold ZAPATA—C & K harmless against any and all liability for injuries and damage to DEI and its agents and employees, incident to or resulting from the operations or services to be performed by DEI hereunder. DEI shall be liable for any injury to any employees of ZAPATA—C & K, or to third persons, or the public, or their property, caused by any negligent act or omission of DEI or its servants, agents or employees. In the event DEI engages any sub-contractor for work on the above-described facilities, DEI shall obtain a written agreement with such sub-contractor by which such sub-contractor shall agree to be responsible for, and to indemnify Zapata-C & K against, any and all liability for injuries and damage to such sub-contractor and its employees and agents, incident to or resulting from the operations of, or services performed by, such sub-contractor on said facilities."

APPENDIX II

Written Well Service Agreement of December 1, 1968, Between C & K and DEI:

"I.

(3) DEI shall take cognizance of all regulations issued by the United States Coast Guard, United States Bureau of Land Management and other regulatory authorities affecting said offshore facilities, and any future amendments and modification thereof, and shall cause said offshore facilities to be maintained and operated in accordance with such regulations (including the preparation and filing of any reports required by such regulations), or if DEI

is unable to comply with such regulation, DEI shall promptly notify ZAPATA—C & K, and shall render such assistance as ZAPATA—C & K may reasonably request in order to comply with such regulations.

"VII.

In the performance of the work and service herein contemplated, DEI shall be an independent contractor and DEI shall have authority to control and direct the performance of the details of the work or services. It is specifically understood and agreed that all persons employed by DEI in the performance of the work or service covered by this agreement are not the employees of ZAPATA—C & K for any purposes whatsoever. DEI shall not be deemed to be the agent of ZAPATA—C & K except to the extent, and only to the extent, required for the filing of reports and other documents required under the regulations of regulatory authorities and provided herein to be prepared and filed by DEI."